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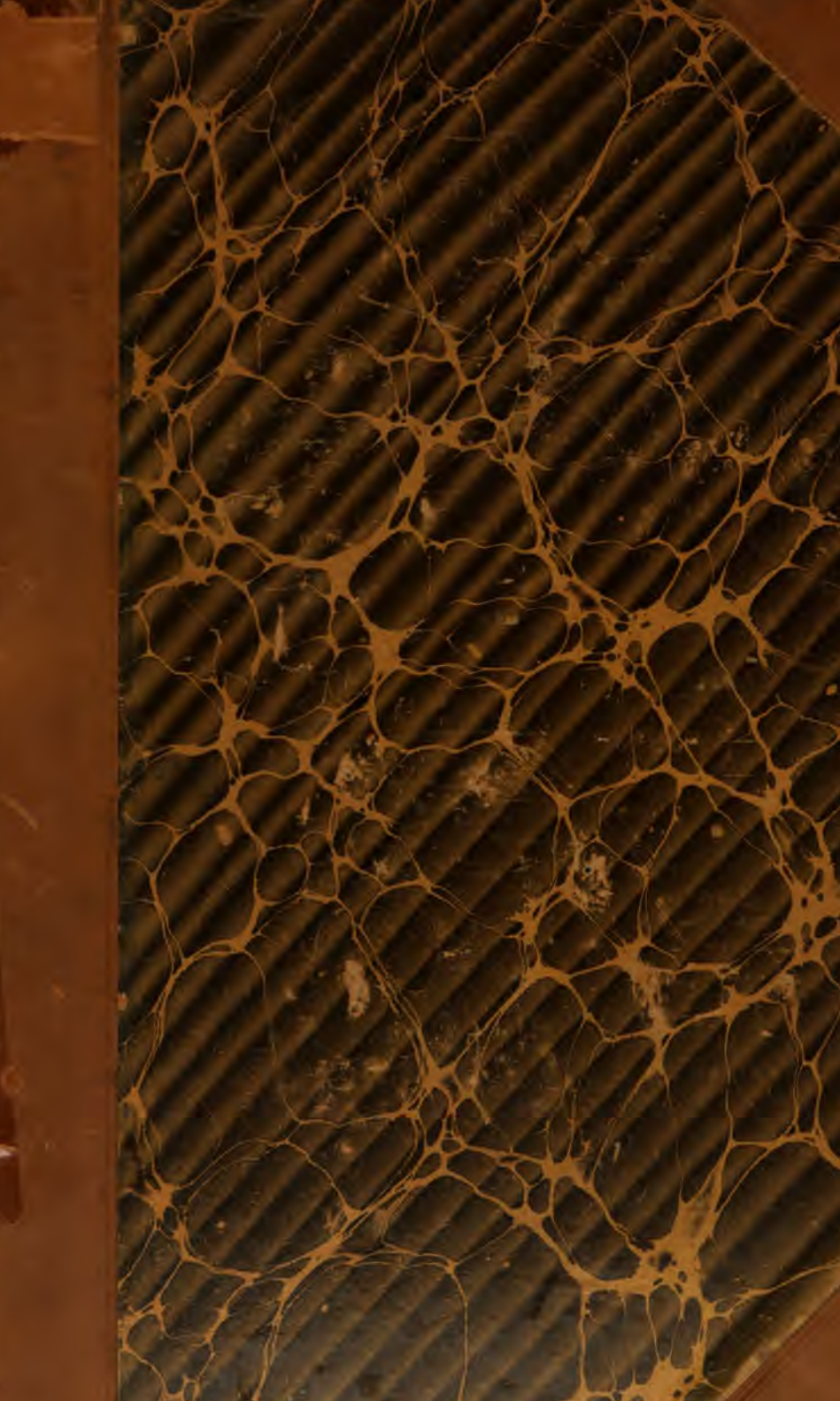
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Pygmaea
(Canary)



Sept. 12. 1895
(Canton)



THE MANITOBA

2284

LAW JOURNAL

EDITED BY

JOHN S. EWART,

ONE OF HER MAJESTY'S COUNSEL.

VOLUME II.

WINNIPEG:

ROBERT D. RICHARDSON, PUBLISHER.

1885.

59,575

CLARK & FINEFORD, JR., UNIVERSITY
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THE
MANITOBA LAW JOURNAL.

VOL. II.

JANUARY, 1885.

No. I.

JUDICIAL KNOWLEDGE.

MR. JUSTICE ROSE (Ontario), held that he had no judicial knowledge that beating, and playing, a drum were the same thing, and discharged a prisoner because the fact had not been proved. *4 C. L. T. p. 31.*

Mr. Justice Moss, on the other hand, did not account himself judicially ignorant of the fact that an accommodation endorser usually, after endorsement, hands the note to the maker in order that it may be put in circulation. "I do not feel bound," said that exceedingly able judge, "wholly to shut my eyes to the notorious fact, with which every member of the community, who is concerned in, or has had occasion to observe the dealings of merchants, brokers, and bill discounters with their customers, is perfectly familiar, that such transactions are of every day occurrence, and are entered into under the belief that the law warrants the assumption that the endorser has lent his name to enable the maker to use the note in the money market." *Cross v. Currie, 5 Ont. App. 31.*

Lord Campbell, C. J., was still bolder, and asserted that common law judges were judicially informed of the doctrines of the Court of Chancery, and resented somewhat savagely the imputation that he knew nothing at all about equitable principles. "I have no doubt," he said, "that the judges of a common law court take judicial notice, not only of the doctrines of equity, but of those of every branch of English law, when they incidentally come before them. When a

question of ecclesiastical law arose, it used to be the practice to send for two doctors. Those learned persons, when they came, were treated with great respect; but they came as advocates to argue the law, not as witnesses to state it. It has sometimes been said that we know nothing of parliamentary law; but, if a question of parliamentary law does come before us incidentally, in a matter over which we have jurisdiction, we must decide it, and must inform ourselves as best we can. So in a question of equity. If we do not know the doctrine of equity, we are supposed to have the means of learning it." *Sims v. Marryatt*, 17 Q. B. 291.

Our own court has lately decided that an Imperial order-in-council published, and bound up with, the Dominion statutes, must be judicially noticed. *Re Stanbro*, 2 M. L. R. 1. The propriety of this last decision we propose to examine.

Mr. Justice Smith is reported to have said: "Up to the year 1875 the necessity of proving orders-in-council undoubtedly continued, but in that year the statute 38 Vic. c. 1, was passed, and this seems to have placed these orders-in-council on a different footing." That statute provides that such of the Acts of the Parliament of Canada, "and such orders-in-council and proclamations or other documents, and such Acts of the United Kingdom as the Governor-General-in-Council may deem to be of a public and general nature or interest in Canada" shall be published in the first volume of the statutes. Passing by the question whether this statute applies to Imperial orders-in-council, there can be no doubt that it does not, in terms, at all events, provide that documents so published may be proved by production of the volume in which they are printed, nor that, after such publication, they shall be judicially noticed; but it is held that, upon the true construction of the statute, not only, if it were necessary, could an order-in-council be proved by the production of the volume of the statutes, but that, without such production, judicial notice of the document must be taken by the Court.

If this were the true construction of the statute there would have been no necessity for the passage of the subse-

quent Act, 44 Vic. c. 28. This statute, which, by the way, does not appear to have been alluded to either in the argument or in the judgments of the court, provides that "*prima facie* evidence of any proclamation, order, regulation or appointment . . . may be given . . . in all or any of the modes hereinafter mentioned, that is to say :—1. By production of a copy of the *Canada Gazette* purporting to contain a notice of such proclamation, order, regulation or appointment ; 2. By the production of a copy of such proclamation, order, regulation or appointment purporting to be printed by the Queen's Printer for Canada."

A means, therefore, is provided whereby the existence of Dominion orders-in-council *may be proved*. It does not relate to Imperial orders-in-council, and does not provide that judicial notice shall be taken even of Dominion orders. Before, therefore, a judge can know anything judicially of a Dominion order-in-council its existence must be proved before him ; for it can hardly be contended that a statute was passed providing an easy means of proving documents of which the judges had judicial notice before the Act was thought of.

But we think that the decision in *Re Stanbro*. although not supportable upon the grounds mentioned in the judgment, is good upon another ground. Under the Imperial Act 31 & 32 Vic., c. 37, "The Documentary Evidence Act, 1868," proof may be made of Imperial orders-in-council, "by the production of a copy of such proclamation, order or regulation purporting to be printed by the government printer, or, where the question arises in a court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession." The order in question was printed under the authority of the Dominion parliament. It could, therefore, have been proved by the production of the volume of the statutes in which it appears, and that volume was produced. The Imperial Act, just quoted, was cited upon the argument of the case, but the judges seem to have overlooked it, or not perceived its applicability.

VENDOR AND PURCHASER—RETURN OF DEPOSIT.

THE decision of the Lords Justices, in *Howe v. Smith*, 27 Ch. D. 89, determines an important point. Upon a contract for the sale of land, the purchaser paid to the vendor £500 "as a deposit and in part payment of the purchase money." The contract provided that the purchase should be completed on a named day, and that, if the purchaser should fail to comply with the agreement, the vendor should be at liberty to re-sell, and to recover any deficiency in price as liquidated damages. The purchaser made default, and afterwards the vendor re-sold the property for the same price. The purchaser then sued for specific performance, and in the alternative asked for a return of the deposit. The court held that he was not entitled to either relief.

If a purchaser pay a deposit and the contract falls through because of his own conduct, it is clear (apart from the terms of any special contract) that he has no cause of action. He cannot sue for money had and received to his use, upon a consideration which has failed, because the vendor received the money rightfully, and the rescission of the contract by the purchaser can give him no cause of action. Moreover, it may be that a deposit on a purchase is a pledge, from the purchaser to the vendor, that the contract will be duly performed and, by an implied term of the agreement, it is to be forfeited unless the contract is fulfilled.

The vendor has at law (apart from the terms of any special clause in the contract) a perfect right to sell the property to another after default by the first purchaser. In equity, however, the purchaser has a reasonable time after the day fixed for completion, unless time be made of the essence of the contract. After this reasonable time has elapsed the vendor is in no way bound by the contract,

the contract is at an end, and he holds the property as though it had never been made. He can sell the land for his own benefit, or he may, if he choose, keep it.

Then, does the special agreement in this case make any difference? May not the vendor's position be affected by a clause which provides that in case of default the vendor may sell, and, if there be a deficiency on re-sale, the vendee is to make it good. In such a case it may, very well, be urged that, in case of default, the contract was not to be at an end at all, that the agreement provides for the *continuation* of the relationship of vendor and purchaser, and that the vendor is given a power of sale over property that by the contract belongs to the purchaser. In other words, that the parties placed themselves in the relationship of mortgagor and mortgagee, the equitable estate being in the purchaser and the legal, with a power of sale, in the vendor.

This seems to be a very reasonable view to take of the matter, but it does not appear to have been presented upon the argument of the case, and we have not the benefit of the opinion of the judges upon it. The court held that when the vendor sold he did so as owner of the property; that the contract not having been performed by the purchaser, but on the contrary, by long delay, having been, in effect, repudiated by him, was at an end; and that the vendor did not require the assistance of the power contained in the contract in order to effect a sale. This view gives no effect to the special clause at all; in fact, one of the judges disposes of it summarily by saying: "we may pass by that special clause, for I think it does not really deprive the deposit in this case of the character which it would bear if there were no special clause."

If there be no provision in the contract governing the relationship of the parties after default, the law terminates the agreement, but *Expressum facit cessare tacitum*; and where the contract does provide for the continuation of the relationship of the parties after default, why should that clause be struck out of the agreement?

The principle of *Palmer v. Temple*, 9 Ad. & El. 508, appears to be applicable. In that case £300 was paid by way of deposit and in part payment of the purchase money, and the agreement stipulated that if either party should refuse to perform the agreement he should pay to the other £1,000 as liquidated damages. It was held that there was no other remedy for a breach of the agreement but that provided by the contract, and consequently, although the purchaser had made default, and the vendor might have sued for the penalty, and recovered damages, yet, as he had sold the estate to another, the purchaser was allowed to recover his deposit. Lord St. Leonards, in referring to this case (*Sugden on Vendors and Purchasers*, 14th Am. Ed. 58,) uses it as an authority for the proposition that "when there is no specific provision, the question whether the deposit is forfeited depends on the intent of the parties, to be collected from the instrument." In comparing *Palmer v. Temple* with *Smith v. Howe*, it will be observed that, in both of them the money was paid as a deposit and in part of the purchase money, and that, in both provision is made for the consequences of default; and we submit that in the latter, as in the former, such provision must govern the rights of the parties.

If *Howe v. Smith* be good law, it must be remembered that it does not, at all events, determine what the rights of the purchaser would have been in case the sale had taken place before the lapse of a reasonable time after the day fixed for completion. In that case, the court might hold that inasmuch as the purchaser would at that time have been entitled to performance of the agreement, the sale was in pursuance of the agreement; that the provisions of the agreement should determine the right to the deposit; and that in such case the vendor could not retain more than enough to satisfy the deficiency on re-sale.

Nor does it cover the case of a purchaser merely making such delay as would disentitle him to specific performance, if his conduct do not amount to a repudiation on his part of the contract. Cotton, L. J., said, "In order to enable

the vendor so to act (that is, to retain the deposit), in my opinion there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation, on his part, of the contract." This statement detracts largely from the value of the decision and introduces an element of most perplexing uncertainty. If by delay the right to specific performance is gone (and consequently the right to sue for breach of the contract at law), there may still remain the right to recover the deposit, if the purchaser's conduct does not "amount to a repudiation, on his part, of the contract!" The facts of the case itself render this statement all the more perplexing, for there was no conduct on the part of the purchaser showing a repudiation other than mere delay. On the contrary, he was always anxious to carry out the contract, but being short of money was never able to do anything but apply for more time, and finally he filed a bill for specific performance. Mr. Justice Fry's decision is more satisfactory: "In a word, the purchaser has, in my opinion, been guilty of such delay, whether measured by the rules of law or equity, as deprives him of his right to specific performance, and of his right to maintain an action for damages—and, *under these circumstances*, I hold that the purchaser has no right to recover his deposit." Bowen, L. J., however, agrees with Cotton, L. J., in his statement of the application of the rule, and the result must be deemed to be uncertain and disappointing.

One other point which remains for settlement, in various other suits is, whether money expressed to be paid "as a deposit and in part payment of the purchase money," is in every case to be subject to forfeiture upon such default of the purchaser as mentioned in *Smith v. Howe*. If the purchase money be \$1,000, and \$750 be the amount paid, is this sum a deposit—a pledge for the performance of the contract; or does not its very proportion show that it was not intended to be a pledge. Of course it may be said that the parties have called it a deposit, and the law says a

deposit is a pledge. But parties may provide in other ways for a forfeiture of money, and even provide that the amount named is to be recoverable as liquidated damages, and yet the courts give effect to what must have been the intent of the parties, and do not always bind them by the actual words of their bargain. *Per Bramwell, B.*, in *Betts v. Burch*, 4 H. & N. 511; 28 L. J. Ex. 271; and see *per Lord Coleridge, C. J.*, in *Magee v. Lavell*, L. R. 9 C. P. 115; 43 L. J. C. P. 135. And it is said to be clearly settled "that whether the sum mentioned in an agreement to be paid for a breach, is to be treated as a penalty or liquidated and ascertained damages, is a question of law, to be decided by the judge upon a consideration of the whole instrument." *Per Wilde, C. J.*, in *Sainter v. Ferguson*, 7 C. B. 716.

Re Dagenham Dock Co., L. R. 8 Ch. 1022, is very much in point. In that case a sale of an estate was made upon the terms that half the purchase money should be paid at once, and the other half on a stated day, and that if the whole were not paid off by that day, the vendor should retain the estate, and all the money then paid should be forfeited. This provision was held to constitute a penalty, because the forfeiture was to occur if any part of the purchase money, however small, remained unpaid. In this case the court had not to construe a deposit into a pledge, for the parties themselves had agreed that it was to be a pledge, and that the pledge was to be forfeited upon non-performance, and yet the court refused to permit the forfeiture to take place.

Robertson v. Dumble, 1 M. L. R. 321, is the only case in our own court upon the subject.

NON-SUITING AT THE TRIAL.

IN the recent libel suit of *Adams v. Coleridge*, Mr. Justice Manisty non-suited the plaintiff after the jury had returned a verdict in his favor of £3,000. The defendant is the son of Lord Chief Justice Coleridge, and Mr. Justice Manisty has been vigorously denounced for overruling the jury—the defendant's relationship to a brother judge being assigned as the reason for the unusual act.

The alleged libel was contained in a letter written by the defendant to his sister who was engaged to be married to the plaintiff. It contained many statements which were beyond doubt libellous, and which were at the trial proved to be untrue. The defendant pleaded that the letter was a privileged communication, and placed his whole defence upon that ground.

At the close of the plaintiff's case a non-suit was applied for, but the judge refused to express an opinion, and determined to allow the case to go to the jury. The closing part of the charge, as reported in *The Times* (Eng.), was as follows:—"In conclusion, he told the jury that if they were satisfied that the defendant wrote the letter honestly, and from no bad motive, then they ought to find for the defendant; but if they were satisfied that he wrote it maliciously and from some bad motive then they would find for the plaintiff."

When the jury returned from deliberation the foreman said—"We think that the defendant not having retracted when he was offered the opportunity, there must have been some vindictiveness in his mind, that having the opportunity once offered to him he did not accept it."

"The learned judge.—Do you say that upon that ground you find for the plaintiff?"

"The foreman.—We judge from that there must have been some vindictiveness.

"The learned judge."—And you find malice?

"The jury.—Yes, malice.

The damages assessed were £3,000.

"Attorney General.—Now, my Lord, I ask your judgment on the question of law I submitted to you—whether there is any evidence to warrant a verdict for the plaintiff.

"The learned judge.—I am of opinion that there was no evidence on which such a verdict could be given; and I therefore direct judgment to be given for the defendant."

, This method of proceeding would certainly be said to be unusual in Manitoba, and it strikes one, at first, as not only anomalous but unfair—if the verdict is for the defendant he gets it, but if for the plaintiff the defendant wins all the same. But let the learned judge defend himself. Several days after the trial he took occasion to explain his action, and is reported as follows:—"There seems to be a general misunderstanding as to the course I took on Saturday. It seems to have been thought that it was an unusual and improper course to take. But it is a course I had taken before, which other judges have also taken, and which I shall take again under similar circumstances. The reasons upon which I have so acted are, that it is decidedly for the interests of both parties, and tends to bring the litigation between them to as speedy an end as possible. It is a course, I think, especially in the interest of the plaintiff. I think, however, it is in the interest of both parties, and for this reason—that if I am wrong the Court of Appeal will say so, and will then be in a position finally to dispose of the case, having a verdict for the plaintiff. If they think I was wrong, they will hold the verdict right, and so the case will be brought to an end without putting the plaintiff to the delay and expense and risk of a second trial."

We own ourselves entirely convinced, by this statement, of the propriety of the course taken at the trial. If the

judge had non-suited before verdict, and it turned out that he should not have done so, the plaintiff would have had much more reason to complain. The delay attendant upon a new trial and a repetition of term and appeal proceedings, might have rendered his judgment but a barren victory. Change in the defendant's circumstances might have enabled him to defy the sheriff, and the judge whose erroneous ruling caused the delay might then fairly be looked upon as the cause of the plaintiff's loss.

STATISTICAL LITERATURE.

WE find from the Toronto newspapers that there were 23,151 writs issued out of the three Divisions of the High Court of Justice in Ontario, between August, 1881, and December, 1884.

During the same period there were issued out of the Court of Queen's Bench, in Manitoba, in the Eastern Judicial District alone, 12,554. (We have not at hand the figures for the other two Districts.) To this must be added the number of bills filed in equity, amounting to 1,835, for in Ontario both suits and actions are commenced by writ. The figures, therefore, stand as follows:—

Ontario 23,151.

Manitoba—Writs 11,534

“ Bills 1,835—13,369.

To dispose of this work Ontario has 14 judges and a Master in Chambers (who does all the Chamber work), or 15 judicial officers; Manitoba has 4 judges and a Referee who attends to equity chamber matters only, or less than one-third of the entire chamber work, and we may, therefore, estimate the judicial staff at $4\frac{1}{3}$. In Ontario, therefore, there is one judge for every 452 writs issued in a year; and in Manitoba, one for every 903!

But the inequality is still greater. We have said that the writs issued in the Central and Western Judicial Districts are not included in the above figures. Nor is any account taken of all the speedy criminal trials which the judges have to dispose of in the absence of the county judge. In addition to these, the Court of Queen's Bench here is a Court of Appeal for the whole of the North West Territories; a branch of jurisdiction involving the study of the Ordinances of the Territories.

In view of these figures, and considerations, it is not surprising that our court feels itself wholly unable to keep pace with the work; that if a persistent attack is made upon the assize list, equity and term work are necessarily neglected and allowed to accumulate; that if term, on the other hand, is prolonged for a month, then the lists of cases awaiting trial struggle for hanging-room in the Prothonotary's office; that the strength of judges, from time to time, fails them under the stress of unremitted labor, and ever and anon, one or another completely breaks down; that lawyers are nearly torn to pieces by their clients for the unavoidable delays; that clients are ruined by being unable to obtain decisions; and that fraudulent debtors bid defiance to any creditor, who, forgetting the impossibility of coercion, throws off for the moment the attitude of respectful consideration for his master—his debtor.

At the last assizes 164 cases were upon the docket. Almost every one of these involved a contest more or less prolonged; undefended issues being now almost obsolete, owing to the practice of striking out time defences in chambers. But with us the assize lists exhibit only a small proportion of the cases actually tried. Every Tuesday is set apart for trying non-jury cases, and the judges, in their endeavour to cope with the arrears, devote every other day of the week, not otherwise occupied, to hearing such cases as parties consent to bring before them. Interpleader issues rarely go to the assizes. Provision is made for their disposition in chambers, upon oral evidence, and many a day is taken up with these trials.

The docket for last Term shewed a list of 111 rules for argument, in addition to which were North West appeals and habeas corpus proceedings. Term sat for a month—up to the close of the week preceding Christmas—and succeeded in clearing off the rules of Easter Term, leaving those taken out in Trinity and Michaelmas untouched!

A short Chancery sittings was held last November, Mr. Justice Taylor giving the time between his Brandon circuit and Term to the work. The next sittings are fixed for the 13th January. Already 44 cases are entered for hearing, and we may safely count upon 20 or 25 being added before the list closes. Term commences again upon the 2nd February, and many of the Chancery suitors, therefore, will have to possess their souls in patience until another chance opportunity is afforded them of spending another \$100 in gathering their witnesses together again.

Last long vacation we had to chronicle the ill-health of Mr. Justice Dubuc, attributable directly to over-work. This vacation witnesses the prostration of Mr. Justice Smith, with the prospect of but slow recovery to working strength. Day after day in the face of advancing weakness Mr. Justice Smith held to his work. Every day for a month (and that immediately following a long assize) he sat in Term from 12 to 6 p.m., o'clock, buoying himself with stimulants and the resources of a resolute will, but being steadily worsted in the unequal contest. Now that vacation has come, the reaction, we regret to say, finds him in the hospital, extremely weak, and with some serious ailments and complications to combat. Let the Society for the Prevention of Cruelty to Animals expend a share of its sympathy and protection upon over-worked judges, instead of lavishing it all upon horses. Our Governor General the other day appeared at the Police Court against a man whom he had caused to be arrested upon a charge of abusing a horse. Is his Government not chargeable with a greater crime?

INSOLVENCY.

OPINION as to the advantages and disadvantages of an insolvency law seems to be governed by that impulse which leads men to grasp at any possible relief from present difficulty. When the law is in force it seems to legalize fraud, and when it is repealed nothing seems to bid more fair than a provision for equal division of an insolvent's estate. At present, opinion is strongly in favor of another attempt at legislation, and we may, within a year or two, expect to be compelled to furbish up our rusty knowledge of the former Acts, and to study the new one.

Meanwhile, it is proposed that the local legislature should take the matter in hand. *Le Manitoba* advocates the introduction, here, of the provisions of the Civil Code of Quebec, and speaks thus favorably of its provisions:—

“A Manitoba et à Ontario, les créanciers qui arrivent les premiers dans le bureau du Shérif prennent tout, et les autres, si le débiteur refuse de faire cession, perdent leur créance en entier. C'est bien le cas de répéter: “Tarde venientibus ossa.” Puisque les biens du débiteur sont le gage commun de ses créanciers, pourquoi n'amenderions nous pas nos lois de manière à autorsier une distribution judiciaire équitable entre tous les créanciers? Cette loi aurait encore pour bon résultat de diminuer les poursuites contre les débiteurs insolubles et de leur substituer une simple réclamation sous serment. Cette distribution est peu dispendieuse, équitable et se fait avec la sanction des tribunaux. Elle prévient les abus, peut atteindre et empêcher les fraudes et régler définitivement toutes les questions litigieuses qui peuvent se présenter. La preuve que cette loi est excellente c'est que dans la Province de Québec, le rappel de la loi de banqueroute n'a produit aucun change-

ment considérable dans la liquidation des affaires commerciales. Le code civil contient une loi complète de faillite, plus parfaite, plus expéditive et beaucoup moins dispendieuse que celle qui avait été adoptée à Ottawa. La chose vaut la peine d'être essayée."

It must be remembered, however, that insolvency is a subject of legislation exclusively within the jurisdiction of Parliament, and that while Quebec may enjoy the provisions of its Code (they having become law prior to confederation), it does not follow that our local legislature would have power to enact similar provisions. It is inadvisable also (even if it were possible) that the insolvency laws should differ in the various provinces. An effort is being made in the United States to remove this subject of legislation from the State legislatures to Federal jurisdiction, on account of the extremely close trade-relationship of the States, and we think it would be a mistake to establish the contrary principle in Canada. It will be better to wait until opinion becomes sufficiently strong to compel a Dominion Act.

MR. JAMES BETHUNE, Q.C.

IT is with the greatest regret that we notice the announcement of the death of Mr. Bethune. He has been cut down in the very height of a most prosperous and brilliant career at the bar.

Mr. Bethune combined in himself almost all the essentials of the ideal advocate—some of them in more, and some in less, perfect degree. He was always enthusiastic and industrious; possessed a good voice, impressive presence,

and frank and truth-expressing face; in his speech there was no hesitation; and his utterance, although rapid, was clear and distinct. In these qualities, and in his rapid grasp of facts, he had no superior at the Ontario bar. Combined with them, but in less perfect degree, he possessed a good memory, a large and comprehensive knowledge of the law, and an instinctive astuteness in his methods of argument.

His very frankness of disposition, however, and his impetuosity sometimes prevented his discovery of some less apparent but valuable point. He lacked the detective suspicion of honest-looking facts, which, with some other counsel is so fruitful of success. His attacks were as open as his nature was honest. He always attacked directly in front, and seldom prepared pit-falls or torpedoes for his opponents. With his mind set upon the main issue he drove straight at it, and neglected the aid or shelter of irregularities by the way. But his attack was always strong and vigorous, and frequently carried the day against heavy odds and many cunning devices and ambuscades carefully set for his humiliation.

Mr. Bethune was a general favorite, and was on good terms with himself and everybody else; always buoyant and hearty; always cheerful and sure to win—if not here, in the Court of Appeal, the Supreme Court, the Privy Counsel, wherever it should be necessary to go for the establishment of his opinion. His clients and the junior bar, from whence he received his greatest employment, held him in the very highest estimation, and reposed in him the completest confidence,—a confidence to which his numerous successes most justly entitled him. His removal will leave a place at the bar that no other can fill, and a blank in the hearts of his many friends who have been drawn towards him through many years of friendship by his genial, generous, and manly bearing and character.

THE
MANITOBA LAW JOURNAL.

VOL. II.

FEBRUARY, 1885.

No. 2.

A SYNOPSIS OF THE MORE IMPORTANT IMPERIAL
ACTS, &c., RELATING TO MANITOBA AND
THE NORTH WEST TERRITORIES.

2ND MAY, 1670.—*Royal Charter for Incorporating The
Hudson's Bay Company.*

This charter was granted by Charles II. It recites that Prince Rupert and others had undertaken an expedition for Hudson's Bay, for the discovery of a new passage into the South Sea, and for the finding some trade for furs and other commodities. It gives, grants, ratifies and confirms unto Prince Rupert *et al.*, and such others as shall be admitted into said Society thereafter expressed, that they shall be one body corporate in deed and in name, by the name of The Governor and Company of Adventurers of England, trading into Hudson's Bay, and by such name have perpetual succession, and capable in law to have, purchase, receive, possess, enjoy and retain, lands, rents, privileges, liberties, jurisdictions, franchises and hereditaments, and also to give, grant, demise, alien, assign, and dispose of, lands, tenements and hereditaments. It gives, grants and confirms unto the said governor and company, and their successors, the sole trade and commerce of all those seas, "streights," bays, rivers, lakes, creeks and sounds, in whatsoever latitude they shall be, that lie within the entrance of the

"streights" commonly called "Hudson's Streights," together with all the lands and territories upon the countries, coasts, and confines of the seas, bays, lakes, rivers, creeks, and sounds aforesaid, that are not already actually possessed of, or granted to, any of the King's subjects, or possessed by subjects of any other Christian Prince or State. It makes, creates and constitutes the said governor and company for the time being, and their successors, the true and absolute lords and proprietors of the same territory, limits and places, saving always the faith, allegiance, and sovereign dominion due to the King, his heirs and successors for the same, to be holden of the King, his heirs and successors, as of his manor of East Greenwich, in the county of Kent, in free and common socage, and not *in capite* or by knight's service, yielding and paying for the same, two elks and two black beavers, whensoever and as often as he the King, his heirs and successors, should happen to enter into the said countries, territories and regions thereby granted.

That it shall be lawful for the said governor and company, and their successors, to make, ordain, and constitute such and so many reasonable laws, constitutions, orders and ordinances as to them shall seem necessary and convenient for the good government of the said company, and of all governors of colonies, forts and plantations, factors, masters, mariners and other officers employed, or to be employed, in any of the territories and lands aforesaid and in any of their voyages; and for the better advancement and continuance of the said trade or traffic and plantations; and the same laws, constitutions, orders and ordinances so made to put in use and execute accordingly, and at their pleasure to revoke and alter the same, or any of them, as the occasion shall require; and that the said governor and company shall and may lawfully impose, ordain, limit and provide such pains, penalties and punishments upon all offenders contrary to such laws, constitutions, orders and ordinances, or any of them, as to the said governor and company for the time being, or the greater part of them then and there being present (the said governor or his deputy being always one),

shall seem necessary, requisite or convenient for the observation of the same laws, constitutions, orders and ordinances, and the same fines and amerciaments shall and may by their officers and servants levy, take and have to the use of the said governor and company and their successors. All and singular which laws, constitutions, orders and ordinances to be made, are to be duly observed and kept, under the pains and penalties therein to be contained, so always as the said laws, constitutions, orders and ordinances, fines and amerciaments, be reasonable and not contrary or repugnant, but as near as may be agreeable to the laws, statutes or customs of this realm.

The charter further grants unto the said governor and company, and their successors, that they and their successors, and their factors, servants and agents, for them and on their behalf, and not otherwise, shall for ever thereafter have, use and enjoy, not only the whole, entire and only trade and traffic, and the whole, entire, and only liberty, use and privilege of trading and trafficking to, and from, the territory, limits and places aforesaid, but also the whole and entire trade and traffic to, and from, all havens, bays, creeks, rivers, lakes and seas, into which they shall find entrance or passage by water or land out of the territories, limits, or places aforesaid.

It further grants to the said governor and company, and to their successors, that neither the said territories, limits and places thereby granted as aforesaid, nor any part thereof, nor the islands, havens, ports, cities, towns or places thereof or therein contained, shall be visited, frequented or haunted by any of the subjects of the King, his heirs or successors, contrary to the true meaning of those presents.

It further grants that all lands, islands, territories, plantations, forts, fortifications, factories or colonies, where the said company's factories and trade are, or shall be, shall be immediately and from thenceforth under the power and command of the said governor and company, their successors and assigns, saving the faith and allegiance due to be performed

to the King, his heirs and successors. The said governor and company shall have liberty, full power and authority, to appoint and establish governors, and all other officers to govern them, and the said governor and his council of the several and respective places where the said company shall have plantations, &c., may have power to judge all persons belonging to the said governor and company or that shall live under them, in all causes whether civil or criminal, according to the laws of this Kingdom, and to execute justice accordingly.

And in case any crime or misdemeanour shall be committed in any of the said company's plantations, &c. where judicature cannot be executed for want of a governor and council there, then in such case it shall and may be lawful for the chief factor of that place and his council, to transmit the party, together with the offence to such other plantation, factory or fort, where there shall be a governor and council, where justice may be executed, or into the Kingdom of England, as shall be thought most convenient, there to receive such punishment as the nature of his offence shall deserve.

It further grants unto the said governor and company, and their successors, free liberty and licence in case they conceive it necessary, to send either ships of war, men or ammunition unto any their plantations, &c., for the security and defence of the same, and to choose commanders and officers over them, and to give them power and authority by commission under their common seal or otherwise, to continue or make peace or war with any prince or people whatsoever, that are not Christians, in any places where the said company shall have any plantations, &c. as shall be most for the advantage and benefit of the said governor and company and of their trade; and also to right and recompense themselves upon the goods, estates or people of those parts, by whom the said governor and company shall sustain any injury, loss or damage, or upon any people whatsoever that shall any way, interrupt, wrong or injure them in their said

trade, within the said places, territories, and limits granted by the charter.

That all and every person or persons, any ways employed by the said governor and company within any of the parts, places and limits aforesaid, shall be liable unto and suffer such punishment for any offences by them committed in the parts aforesaid, as the president and council for the said governor and company there shall think fit, and the merit of the offence shall require, as aforesaid; and in case any person or persons being convicted and sentenced by the president and council of the said governor and company, in the countries, lands or limits aforesaid, their factor or agents there, for any offence by them done, shall appeal from the same, that then and in such case, it shall and may be lawful to and for the said president and council, factors or agents, to seize upon him or them, and to carry him or them home prisoners into England, to the said governor and company, there to receive such condign punishment as his cause shall require and the law of the nation allow of.

The charter then proceeds to state: "and we do hereby streightly charge and command all and singular our admirals, vice admirals, justices, mayors, sheriffs, constables, bailiffs, and all and singular other our officers, ministers, liege men and subjects whatsoever to be aiding, favoring, helping and assisting to the said governor and company and to their successors, and to their deputies, officers, factors, servants, assigns, and ministers, and every of them, in executing and enjoying the premises as well on land as on sea, from time to time, when any of you shall thereunto be required."

TREATY OF UTRECHT, 1713.—By this treaty "the Bay and Straits of Hudson, together with all lands, seas, sea coasts, rivers and places situate in the Bay and Straits, and which belong thereto," were finally ceded to Great Britain.

TREATY OF PARIS, 1763.—By this treaty France ceded to England "Canada with all its dependencies . . . in the most ample manner and form without restriction."

By Article VII, "It is agreed that for the future, the confines between the Dominions of His Britannic Majesty and those of His Most Christian Majesty . . . shall be fixed irrevocably by a line drawn along the middle of the Mississippi from its source" to the sea.

The King of Great Britain agreed to grant the liberty of the Catholic religion to the inhabitants of Canada.

PROCLAMATION OF QUEBEC, 7TH OCTOBER, 1763.—By this proclamation the territories to the west and north of Canada and the Hudson's Bay territory were reserved for His Majesty's (George 3rd) Indian subjects.

The law of England civil and criminal was introduced into the ceded territory, then formed into the Province of Quebec.

Power was given to the governors to constitute courts for hearing and determining causes, civil and criminal, according to law and equity, and as near as might be agreeable to the laws of England, with right of appeal in civil cases to the Privy Council.

6 GEO. 3, C. 12.—*An Act for the better securing the dependency of His Majesty's dominions in America upon the Crown and parliament of Great Britain.*

By this Act the colonies and plantations in America are declared to be subordinate to and dependent upon the Imperial Crown and parliament of Great Britain; and the legislative authority of Great Britain declared to extend to and bind the colonies and people of America as subjects in

all cases whatsoever: and all resolutions and proceedings of the said colonies denying or calling in question the said power are declared null and void.

14 GEO. 3, c. 83.—*An Act for making provision for the Government of the Province of Quebec.*

This Act defines the boundaries of the territories in North America belonging to Great Britain; declares that the inhabitants of Quebec may profess the Romish religion, subject to the King's supremacy, as declared by 1 Eliz.; and enacts that the clergy may enjoy their accustomed dues; that His Majesty's Canadian subjects (religious orders excepted) may hold all their possessions; in matters of controversy, resort to be had to the laws of Canada; the Act not to extend to lands granted by His Majesty in common socage; power to alienate by will; that criminal law of England was to be continued; all Acts of Great Britain relating to trade or commerce of His Majesty's colonies and plantations in America and all Acts respecting said colonies and plantations to be in force in said Province of Quebec.

31 Geo. 3, c. 31, and The Stat Law Rev. Act, 1872, repeal the other provisions of this Statute.

18 GEO. 3, c. 12.—*An Act for removing all doubts and apprehensions concerning taxation by the Parliament of Great Britain in any of the colonies, provinces, and plantations in North America and the West Indies; and for repealing so much of an Act made in the seventh year of the reign of His present Majesty, as imposes a duty on tea imported from Great Britain into any colony or plantation in America, or relates thereto.*

See Stat. Law. Rev. Acts, 1867 and 1871.

(To be continued.)

PROPHETIC CONVEYANCES.

At Law.—"Licet dispositio de interesse futuro sit inutilis, tamen fieri potest declaratio præcedens quæ sortiatur effectum, interveniente novo actu."—Lord Bacon's celebrated Rule 14.

"The law has long been settled that a person cannot by deed, however solemn, assign that which is not in him—in other words, that there cannot be a prophetic conveyance." *Belding v. Read*, 3 H. & C. 961, per Pollock, C. B.

"As a general rule . . . a bill of sale can at law operate as a conveyance only of property which exists and belongs to the assignor at the time when he executes it."—*Ibid.* Per Channell, B.

In Equity. The rule in equity is different. "If a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. *Holroyd v. Marshall*, 10 H. L. C., 210, per Lord Westbury.

"A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future; and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment. *Collyer v. Isaacs*, L. R. 19 Ch. D. 343.

Limitation of Rule. This equity rule, however, is applicable only where the subject of the assignment is described in terms sufficiently specific to render its identity certain.

In *Belding v. Read*, 3 H & C. 955, the assignment was of "all his household furniture, plate, linen, &c., and all other his personal estate and effects whatsoever, then being, or

thereafter to be, upon, or about his dwelling-house, farm or premises at R., or elsewhere in Great Britain." It was held that no estate passed in the after acquired goods, for the reason "that the equitable title to goods, as well as to land, is confined to specific goods, and does not extend to goods which are undetermined,"

The description in *Re Thirkell, Perrin v. Wood*, 21 Gr. 492, after mentioning, in general terms, all the stock of drugs and chemicals in the assignor's shop, proceeded: "and also any stock purchased hereafter by the said . . . and which may be in his possession upon said premises during the continuance of this security, or any renewal thereof." These words were held to be sufficiently explicit to pass the after-acquired goods. So also in *Reeve v. Whitmore*, 9 Jur. N. S. 243, where the words were: "the clay, bricks, machinery, plant, live and dead stock, goods, chattels, effects and property which may then be in, upon, or about the said premises."

Lord Westbury's illustration of the rule (*Holroyd v. Marshall*, 10 H. L. C. 209, is as follows: "A contract for the sale of goods, as, for example, of five hundred chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell five hundred chests of the particular kind of tea which is now in any warehouse in Gloucester, is a contract relating to specific property, and which would be specifically performed. The buyer may maintain a suit in equity for the delivery of a specific chattel when it is the subject of a contract, and for an injunction (if necessary) to restrain the seller from delivering it to any other person.

The dictum of *Lopes, J.*, in *Lazarus v. Andrade*, 5 C. P. D., 318, that the principle deducible from *Holroyd v. Marshall*, and *Belding v. Reed* "is, that property to be after acquired, if described so as to be capable of being identified, may be, not only in equity, but also at law, the subject matter of a valid assignment for value" must be considered to be overruled. See *Joseph v. Lyons*, 54 L. J., Q. B. N. S. 4.

As between the grantee and a subsequent assignee for the benefit of creditors—the goods meanwhile having been ac-

quired. We have so far considered the subject as between the original parties. An assignee for the benefit of creditors "is merely the legal personal representative of the debtor with such right as he would have had if not bankrupt, and no other." *Kitching v. Hicks*, 6 Ont. R. 749, per Patterson, J. See also *Re Mapleback*, 4 Ch. Div. 150; *Ex parte Newitt*, 16 Ch. Div. 531; *Harris v. Tremain*, 7 Q. B. Div. 340; *Re De Epineuil*, 20 Ch. Div. 217; *Collver v. Shaw*, 19 Gr. 599; *Re Coleman*, 36 U. C. R. 559; *Re Barrett*, 5 App. R. 206; *Re Andrews*, 2 App. R. 24; *Boynton v. Boyd*, 12 U. C. C. P. 334; *Re Thirkell*, *Wood v. Perrin*, 21 Gr. 504 b.; *West v. Skipp*, 1 Ves. Sr. 239.

As between the grantee and a subsequent execution creditor, the goods meanwhile having been acquired. In *Lazarus v. Lopes*, 5 C. P. D. 318 the grantee was held to be entitled as against a subsequent execution creditor, and this decision is said to be right, although the reason given by the learned judge who decided it was wrong. See *Joseph v. Lyons*, 54 L. J. Q. B. N. S. 4. *Holroyd v. Marshall*, 10 H. L. C. 190, moreover, is ample authority for the same position.

As between the grantee and a subsequent grantee for value—the goods meanwhile having been acquired. As above stated a prophetic assignment does not pass the legal title. It passes an equitable interest only. It constitutes a *jus ad rem*. If then, while the legal title remains in the grantor, by a sufficient assignment, he convey it to a purchaser for value without notice of the outstanding equity, the new purchaser acquires an indefeasible title. At least, this is the decision of the Court of Appeal in England in *Joseph v. Lyons*, 54 L. J. Q. B. N. S. 4.

Query. Had the assignment in the last mentioned case contained a covenant that, upon the acquisition of the goods, the legal title should be conveyed to, or immediately become vested in, the grantee, would the decision have been as it was. There is much in the judgments to show that it would not. If A. agree to sell to B. goods which are to be afterwards ascertained, upon ascertainment the legal title vests in the purchaser. If, then, A. sell to B. certain speci-

fied goods, when they come upon A.'s property, the legal title ought to pass as soon as the time arrives. And if A. lend to B. on security of the same goods, B. should have the legal title at the same time as in the case of a sale. The judges, in *Joseph v. Lyons*, felt the force of this argument, but held it to be inapplicable to the case. *Brett, M. R.*, said: "It was ingeniously argued that the bill of sale was equivalent to a contract by M., that the after-acquired goods should become the legal property of the plaintiff on their being acquired. . . . Can it be said that there was a contract to pass the property in the goods? There never was such an intention. The parties must be taken to have contracted for an equitable, and not a legal, interest." And *Cotton, L. J.*, said: "It is said that the bill of sale amounts to a contract that the goods should be assigned. But the common law says that it is void, and the rule that goods contracted to be sold become the property of the vendor on ascertainment, does not apply when there purports to be a present assignment."

These extracts seem to imply that, if there had been a contract instead of an assignment, the decision would have been for the plaintiff, instead of for the defendant. This would leave the law in a very unsatisfactory and anomalous condition. An absolute assignment of goods ought to be as efficacious to pass the legal title as an agreement to give an assignment of them.

The true answer to the argument just stated seems to us to be that a contract for an assignment of the legal estate will not cause it to pass without *novus actus interveniens*. In the case of a contract for the sale of goods upon ascertainment, the act of ascertaining is in pursuance of the contract, and is *novus actus*, but in the case of a contract to pass the legal title in goods which may afterwards be brought upon the mortgagor's premises, the act of transportation is not in ordinary cases referable to the contract, it is not undertaken for the purpose of carrying out the contract, and there is no *novus actus* at all. See *Lunn v. Thornton*, 1 C. B. 379; 14 L. J., C. P., N. S. 161.

MR. TRAVIS JUSTIFIED, AND CONDEMNED.

IN reviewing a pamphlet issued by Mr. Travis, entitled "A Law Treatise on the Constitutional Powers of Parliament and of The Local Legislatures," we took occasion to find fault with his want of respect for the judges, admitting that the judgments were fair subjects for discussion. *The Legal News* (Montreal), in the same vein, remarked: "We are disposed to think he is right in a good deal of his criticism, though we deprecate the trenchant style in which he deals with adverse views. The subject is confessedly intricate, and it does not follow that because Mr. Travis sees one side in a very bright light indeed, there is nothing to be said on the other."

It is very easy to be philosophical and good-natured when some one else is feeling hurt, but when some cherished notion of one's own is upset, complacency is more difficult. *The Legal News* has evidently had extremely strong opinions anent the boundary case—and neither the award nor the decision of the Privy Council has had the effect of raising the slightest doubt as to the correctness of its views. Our friend's composure has been sadly disturbed by the failure of the court of last resort to confirm his ideas, and like an ordinary human being, as he must be (although he once spoke like a god), gets angry, and joins Mr. Travis in his tirade against the judges. These are a few of its most convincing arguments: "One member, at any rate, of that body (the Privy Council) was competent to understand what he was about"; "the opinion which they have consented to have put in their mouth"; "as far as getting an intelligent opinion on such a question is concerned, we might just as well have appealed to Og, Gog and Magog, or to the Beef-eaters at the Tower. Juge Bridoye's mode of guiding the scales of justice is miserably overlooked., *par les temps qui courent.*" And the advice naturally follows: "not to trouble their Lordships again respecting questions they know nothing about, and which they don't intend to take the least pains to understand,"

We may be permitted to remark that our angry friend may be "right in a good deal of his criticism, though we deprecate the trenchant style in which he deals with adverse views. The subject is confessedly intricate, and it does not follow that because "*The Legal News*" sees one side in a very bright light indeed, there is nothing to be said on the other."

But while Mr. Travis can comfort himself over a convert to his opinion of the usefulness of the Privy Council, he has to mourn the lapse from intelligence of the only judge in whom he had any confidence—the Chief Justice of the Supreme Court. Mr. Travis confidently predicted, that the Dominion License Act of 1883 "being a general Act for the regulation of traffic in intoxicating liquors, for the 'peace and order' of Canada, is an Act regulating trade, and is as valid as the Canada Temperance Act, the Fisheries Act, or the Insurance Act." But the Supreme Court has unanimously decided otherwise. The questions submitted to the court were :—

(1) Are the following Acts in whole or in part within the legislative authority of the Parliament of Canada, viz. :—
I. The Liquor License Act of 1883. II. An Act to amend the Liquor License Act of 1883.

(2) If the Court is of opinion that a part, or parts only, of the said Acts are within the legislative authority of the Parliament of Canada, what part or parts of the said Acts are within such authority.

In rendering the opinion of the court, the Chief Justice said :—"We have considered all the matters referred, and my learned brother Strong, my learned brother Fournier, my learned brother Gwynne, and myself, are of opinion that the Acts in question are *ultra vires* of the Parliament of the Dominion, except in so far as they regulate vessel licenses and wholesale licenses. My learned brother Henry is of opinion that the Acts are *ultra vires* in whole. We shall report to the Government accordingly."

No reasons were given by the Court.

CASES STANDING FOR JUDGMENT.

THERE are now standing for judgment a number of cases argued during last Term. Without legislation, these must all be re-argued after the appointment of a new judge. We would suggest the adoption of the Ontario statute 45 Vic. c. 6, sec. 3, modified as follows :—

“ In case, after a cause or matter in the Court of Queen's Bench has been heard by three judges thereof and stands for judgment, one of the judges by whom the said cause or matter was heard is transferred to the Supreme Court of Canada, or resigns his office, or is absent from illness or other cause, or dies, the remaining judges, if unanimous in their decision, may give judgment, as if such judge were still a judge of the Court of Queen's Bench, and were present and taking part in the said judgment.”

At the same time, an adaptation of the Ontario statute 44 Vic. c. 5, s. 86, might also be passed :—

“ Where a judge of the Court of Queen's Bench, or of any County Court, is transferred to another court, or resigns his office, and any cause or matter which has been fully heard by such judge, either alone or jointly with another judge, or other judges, stands for judgment, he may give judgment therein as if he were still a judge of the same court, and any such judgment shall be of the same force and validity as if he were still such judge, provided that such judgment of the judge be delivered within six weeks after the said resignation or transfer.”

It has been suggested that our Act, which provides that the judge whose decision is appealed from must not take part in the appeal, should be repealed. We trust that it will not. The Act has given the greatest satisfaction, and is sound in principle.

MR. JUSTICE SMITH.

ON Monday, the 19th day of January, died one of the finest men who ever adorned the bench of any court of law. He died because his duties were too heavy for his strength ; and because he regarded the discharge of his duties as of greater importance than the preservation of his health.

The unflinching courage of the soldier who yields his breath rather than his post, is worthy of the highest admiration, for his employment requires the sacrifice. But we humbly submit that there is no implied term in a judge's engagement which demands his death rather than the acknowledgment of *vis major*—the *vis inertia* of too many tangled law suits. It is impossible seriously to blame a judge for working too hard. He can have no selfish object in view—his salary is not affected by the quantity of his work, nor his repose in any way assisted by it. If his labor is excessive it is because he is constrained to it by the demand for the speedy administration of justice, and by a restlessness under the thought of work undone, and, therefore, of wrongs unredressed. But can we not fairly blame the government which, to save a paltry \$4,000 a year, presents to our judges the alternative of heavy overwork or heavy arrears. We should hardly have said *an alternative*, for there is in practice no choice or selection. The judges have both the work and the arrears.

Mr. Justice Smith has been with us only a few months, but during that time he has won the respect and admiration of every member of the bar, not only for his legal ability and attainments, but also for his kind and courteous bearing. His mind was singularly acute, subtle, and logical ; and his knowledge of the law accurate and extensive. He evidently enjoyed discussion, and he never seemed so well pleased as

when chopping law with some learned advocate who was unlucky enough to commit himself to some incomplete, or some too general, proposition. When thus engaged (and it happened frequently) his wonderful resources showed to the greatest advantage; but no barrister ever complained of his interruptions—they were always to the point under discussion at the moment, and always tended to elucidation.

The whole community will join in the following resolution passed by the Law Society:—

“Resolved,—That in the death of the Hon. Mr. Justice Smith the courts of Manitoba and the legal profession have sustained a great loss. During his short residence in Manitoba he had earned the respect and esteem of all who had come into contact with him, and he was universally looked upon as a judge whose course upon the Bench would serve as a model for all who might succeed him. The Law Society desire to express their sincere sympathy with his widow and family in their great bereavement.”

The secretary was instructed to forward a copy of this resolution to Mrs. Smith.

MR. JUSTICE KILLAM.

JUST as we are going to press, the announcement is made that Mr. Killam, Q.C., has been elevated to the Bench. The appointment has been received by the bar, not only with satisfaction, but with gratification, if not absolute enthusiasm—gratification, partly because Mr. Killam will be no unworthy successor even to such a model judge as the late Mr. Justice Smith, and perhaps still more because he belongs to our own bar.

THE
MANITOBA LAW JOURNAL.

VOL. II.

MARCH, 1885.

No. 3.

A SYNOPSIS OF THE MORE IMPORTANT IMPERIAL
ACTS, &c., RELATING TO MANITOBA AND
THE NORTH WEST TERRITORIES.

(Continued from page 23.)

- 43 GEO. 3, c. 138.—*An Act for extending the jurisdiction of the courts of justice in the Provinces of Lower and Upper Canada to the trial and punishment of persons guilty of crimes within certain parts of North America.*

Repealed by the Stat. Law Rev. Act, 1872. It enacted that offences committed within any of the Indian Territories, &c., should be tried in the same manner as if committed within the Provinces of Upper and Lower Canada. The Governor of Lower Canada might empower persons to act as justices for the Indian Territories, &c., for committing offenders until conveyed to Canada for trial, &c. Subjects of His Majesty should be tried, although offence were committed in another European State.

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- 1 & 2 GEO. 4, c. 66.—*An Act for regulating the Fur trade, and establishing a criminal and civil jurisdiction within certain parts of North America.*

This Act empowered His Majesty to make grants for exclusive trade with Indians in certain parts of North America.

Sec. 5 extended 43 Geo. 3, c. 138, to territories granted to Hudson Bay Co. Sec. 6 established courts of judicature in Upper Canada to take cognizance of causes in Indian territories. Sec. 11 authorized His Majesty to issue commissions empowering justices to hold courts of record for trial of criminal and civil offences.

The Stat. Law Rev. Act, 1874, repeals sec. 5 and sections 6 to 13.

3 GEO. 4, c. 119.—*An Act to regulate the trade of the Provinces of Lower and Upper Canada, and for other purposes relating to the said Provinces.*

Repealed by Stat. Law Rev. Act, 1874, except sections 31 and 32, which enact that lands held in fief and seignory may, on petition of owners, be changed to the tenure of free and common socage; and that His Majesty may commute with persons holding lands at *cens et rents*.

6 AND 7 VIC., c. 22.—*An Act to authorize the Legislatures of certain of Her Majesty's colonies to pass laws for the admission in certain cases of unsworn testimony in civil and criminal proceedings.*

By this Act it is enacted that laws or ordinances made by the Legislatures of British colonies for the admission of the evidence of certain persons residing therein shall have the same effect as other colonial laws.

14 & 15 VIC., c. 99.—*An Act to amend the law of evidence.*

By sec. 7, all proclamations, treaties and other acts of State, of any foreign State, or of any British colony, and all judgments, decrees, orders, and other judicial proceed-

ings, of any court of justice in any foreign State, or in any British colony, and all affidavits, pleadings, and other legal documents, filed or deposited in any such court, may be proved in any court of justice, as therein mentioned.

By sec. 11, every document admissible in evidence in any court of justice in England or Wales, or Ireland, without proof of the seal or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent, and for the same purposes, in any court of justice of any of the British colonies, without proof of the seal or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

22 & 23 VIC., c. 26.—*An Act to make further provision for the regulation of the trade with the Indians, and for the administration of justice in the North Western Territories of America.*

This Act recites 43 Geo. 3, c. 138, and 1 & 2 Geo. 4, c. 66, and authorizes justices of the peace in the British American Indian Territories to try offences summarily, and punish by fine or imprisonment: and makes it lawful for Her Majesty, by Order-in-Council, to make regulations for trade with the Indians.

28 & 29 VIC., c. 63.—*An Act to remove doubts as to the validity of Colonial laws.*

This Act recites that doubts have been entertained respecting the validity of laws enacted by the Legislatures of certain colonies, and enacts that any colonial law in any

respect repugnant to any Act of parliament extending to the colony to which such law may relate, or repugnant to any order or regulation, shall be read subject to such Act, order or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative: no colonial law to be void for repugnancy unless same repugnant to some Act or order; no colonial law to be void for inconsistency with instructions given to the Governor of any colony: every colonial Legislature to have full power to establish courts of law: certified copies of laws to be evidence that they are properly passed: and any proclamation signifying disallowance of any colonial law, or assent to any reserved bill, shall be *prima facie* evidence of such disallowance or assent.

30 & 31 VIC., c. 3.—*An Act for the union of Canada, Nova Scotia, and New Brunswick, and the government thereof, and for purposes connected therewith.*

This Act is cited as The British North America Act, 1867.

Sec. 18 repealed by 38 & 39 Vic., c. 38, s. 1.

Sec. 146 enacts, that it shall be lawful for the Queen, by and with the advice of Her Majesty's Privy Council, and on address from the Houses of the Parliament of Canada, to admit Rupert's Land and the North Western Territory, or either of them, into the union, on such terms and conditions in each case as are in the addresses expressed, and as the Queen thinks fit to approve, subject to the provisions of this Act; and the provisions of any Order in Council in that behalf shall have effect, as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

- 31 & 32 VIC., c. 105.—*An Act for enabling Her Majesty to accept a surrender upon terms of the lands, privileges, and rights of The Governor and Company of Adventurers of England trading into Hudson's Bay ; and for admitting the same into the Dominion of Canada.*

This Act gives power to Her Majesty to accept a surrender of lands of the Hudson's Bay Company ; upon such acceptance all rights of the company were to be extinguished ; power given to Her Majesty, by Order-in-Council, to admit Rupert's Land into, and to form part of, the Dominion of Canada.

- 32 & 33 VIC., c. 101.—*An Act for authorizing a guarantee of a loan to be raised by Canada for a payment in respect of the transfer of Rupert's Land.*
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IMPERIAL ORDER-IN-COUNCIL, dated 23rd June, 1870.

This Order-in-Council, after reciting that by the B. N. A. Act, 1867, it was enacted, that it should be lawful for the Queen to admit Rupert's Land into the Union ; that by the Rupert's Land Act, 1868, it was enacted that it should be competent for the Hudson's Bay Company to surrender to Her Majesty, and for Her Majesty to accept a surrender of, all lands granted to said company within Rupert's Land ; that the said Company did, by deed, dated 19th November, 1869, surrender to Her Majesty, all the rights of government and other rights granted to the said Company, and also all similar rights exercised or assumed by the Company in any parts of British North America not forming part of Rupert's Land or of Canada, and that such surrender had been duly accepted by Her Majesty, it was ordered and declared by Her Majesty, that from and after the 15th day of July, 1870,

the said North Western Territory should be admitted into, and become part of, the Dominion of Canada, and that the Parliament of Canada should, from the day aforesaid, have full power and authority to legislate for the future welfare and good government of the said Territory. And it was further ordered, that Rupert's Land should, from and after the said date, be admitted into and form part of the Dominion of Canada, upon the terms and conditions therein set forth.

34 & 35 Vic., c. 28.—*An Act respecting the establishment of Provinces in the Dominion of Canada.*

This Act empowers the Parliament of Canada to establish new Provinces, and to provide for the constitution and administration thereof. It confirms the Acts of the Parliament of Canada, 32 & 33 Vic., c. 3, as to the temporary government of Rupert's Land, and 33 Vic., c. 3, which provides for the government of Manitoba.

36 & 37 Vic., c. 45.—*An Act to authorize the Commissioners of Her Majesty's Treasury to guarantee the payment of a loan, to be raised by the Government of Canada for the construction of Public works in that country, and to repeal the Canada Defences Loan Act, 1870.*

Sec. 9 repealed by Stat. Law Rev. Act, 1883.

38 & 39 Vic., c. 38.—*An Act to remove certain doubts with respect to the powers of the Parliament of Canada, under section eighteen of the British North America Act, 1867.*

This Act repeals sec. 18 of 30 & 31 Vic., c. 3, as to the powers of the Senate and House of Commons, and substi-

tutes a new section therefor. It confirms the Act 31 Vic., c. 24, of the Parliament of Canada, being "An Act to provide for oaths to witnesses being administered in certain cases, for the purposes of either House of Parliament."

44 & 45 Vic., c. 69.—*An Act to amend the law with respect to fugitive offenders in Her Majesty's dominions, and for other purposes connected with the trial of offenders.*

This Act provides for the surrender from the United Kingdom to a British Possession, or from a British Possession to the United Kingdom, of fugitives who are charged with having committed treason, piracy, or some offence which (whether felony, misdemeanor, or other crime,) is, in the part of Her Majesty's dominions where it was committed, punishable by imprisonment with hard labour for twelve months or more, or by some greater punishment.

W. A. TAYLOR.

NEW ORDER.

The following new order has been promulgated:—

Order 457 of the equity general orders of this court is hereby amended, by adding thereto the following words,—
 "but where costs at law, or costs incurred in and about the exercise of a power of sale contained in a mortgage, are claimed by the bill, and by the special endorsement upon the office copy thereof served, the master may, under a decree issued upon præcipe, allow such costs, where it is shown to his satisfaction that the same were *bona fide* and reasonably incurred."

A JURY CHANGE THEIR VERDICT.

An extraordinary case came before Mr. Justice Stephen at Chester assizes yesterday. A coal agent, named Angus Gordon McLean, had been put upon trial charged with embezzling sums of money belonging to the Lancashire coal company. Mr. Marshall made a forcible defense for the prisoner, representing that the accounts had only been muddled. The whole deficiencies discovered amounted to £230.

The jury found McLean guilty, and the judge commenced to pass sentence, when the prisoner appealed to his lordship to allow him to make a statement. His explanation was that the deficiency was quite accounted for by the fact that three hundred customers had left Birkenhead owing to bad trade who had not paid him. Several witnesses were recalled, and the judge said, whether the proceeding was regular or not, he would undertake the responsibility of asking the jury whether, after the prisoner's statement, they wished to hear him (the judge) with reference thereto, and to reconsider their verdict.

Having decided in the affirmative, his lordship again addressed them, and the jury reconsidered their verdict, with the result that they now found the accused not guilty, and he was discharged.—*London Telegraph*.

"TRAVIS ON CANADIAN CONSTITUTIONAL LAW."

PAPER BY ITS AUTHOR.

IN the various criticisms of this work, I have met with several references to the freeness of my criticism, and to the elevated opinion I entertained of the ability of the Chief Justice of the Supreme Court of Canada.

I propose to deal with both of these matters.

As regards the first, I saw at the outset that there was but one course to be adopted if I wished the discussion to be of any practical benefit; namely, honestly and unreservedly to examine the judgments delivered in the different courts, on questions under the Act (B. N. A. Act, 1867); and to treat them, just as I intimated in my book I should do, 'as though I were reviewing a book written by one with whom I had not, personally, the slightest acquaintance; acting independently, on the principle contained in the Shakspearianism I quoted, "Nothing extenuating, nor setting down aught in malice." To sustain my right, in taking this course, I quoted from Lord Justice Bramwell, in *Reg. v. Bishop of Oxford*, 4 Q. B. Div. 556, where he laid down the principle that the opinion and sentences of the Court of Appeal of England, "may, and ought to be, and are, criticised by laymen." I, surely, had an equal right to fairly criticise judgments of courts of only equal or much less high authority.

My success in this respect was recognised in the ablest criticism of my book with which I have yet met; and which was contained in a leading editorial in the *St. John Globe*. The very able editor of that journal says:—

"Mr. Travis deals with all the decisions and writings which he dissects, as a critic does who discusses a subject

on a scientific basis, without any reference to the individuals or persons concerned."

And, again :—

"Mr. Travis' treatment of the subject may be considered the purely scientific one, inasmuch as it is made without any regard to the persons whom he discusses."

In an article I wrote, in reply to one of the earliest criticisms, as to my freedom of discussion, I then disposed of that matter as follows :—

"In my discussion of the different arguments of counsel, and judgments of courts and judges, all were treated with equal impartiality. When, in the judgments of Ritchie, C. J., in the Supreme Court of N. B., I found principles laid down that seemed to me unsound, I pointed out such instances with the same plainness that I used in directing attention to a fallacy in the argument of Mr. Blake. When I found a series of Privy Council judgments, extending over a number of years, establishing what seemed to me, in the exercise of my highest intelligence, sound principles, I quoted from those judgments very fully; and, of course, recognized their high authority. But, when I found later judgments of the same court, which, in the exercise of the same degree of intelligence, I could not honestly express the opinion were correct, I did not shirk the responsibility of expressing an honest opinion even of them; and of giving, very fully, the reasons on which my honest opinion was founded; being able, too, in more than one instance, to quote the Privy Council against themselves.

"If, in discussing my subject, I had refrained from showing that judgments which *are* absurd, and which have tended so greatly to create the confusion in which the subject has been involved, are really as I have represented them, the discussion, certainly, would have been of extremely little utility. I preferred, honestly, from my conviction and best judgment on the particular decision, frankly telling the truth; and that, not with 'bated breath,' nor 'whispered humbleness.'"

And, again :—

"If the critic in question, or any one else, has any intelligent objection to make to the opinions expressed by me of any of the judgments examined by me, or to any of the conclusions at which I have arrived; I would be only too happy, in the very best spirit, to meet such objection, and either to justify my opinion, or to frankly acknowledge its incorrectness. My one object in the matter is to come to sound conclusions; and, with all deference to my critic, I see nothing in his article, as pretentious as, towards the close, it becomes, to cause me to question that I have done so."

"The critic in question," having elected to act on the principle that "discretion is the better part of valor," and not having accepted my invitation, my proposition to the "any one else," still remains open; with a renewal, on my part, of the undertaking, as made in the above quoted passage.

On the other point, as to the implication, rather than the positive assertion, of something bordering on servility, or toadyism, in my approval of the judgments, generally, of Ritchie, C. J., delivered in the Supreme Court of Canada; I saw no more servility or toadyism in that than I did in pointing out what the law is as established by the well-decided Privy Council cases of *Cushing v. Dupuy*, *Valin v. Langlois*, &c., &c. Certainly, as a matter of mere feeling, it would have been much more pleasant for me to have been generally able to agree with the very able Judge, and one of the kindest and most courteous of gentlemen (I beg his pardon; I allude to Mr. Justice Gwynne), than with one whose proverbial rudeness amounts at times to almost boorishness. But, I had nothing to do with mere *feeling* in the matter. The duty with which I had charged myself was to ascertain the *law*.

But, with reference, further, to the idea of my tamely following the learned Chief Justice of Canada, right or wrong, nothing is further from the truth. In two cases,

E. & N. A. R. Co. v. Thomas, 1 Pugs., 52, and *The Queen v. Dow*, *Ibid.*, 300, the former of which was not appealed, and the latter of which was reversed on appeal to the Privy Council; I was of the opinion, and still am so, that Ritchie, C. J., in his judgment in these two cases, in the Supreme Court of New Brunswick, was wrong. See *Candn. Cons. Law*, pp. 14 & 15. And, in his celebrated case, in that court, of *Regina v. The Justices of King's*, I questioned (*Ibid.*, p. 54,) whether he would now use such language as he then employed; and also questioned his accuracy in doing so, if he would now employ such language as that to which I took exception. Again, in *The Queen v. Chandler*, he uses language which I did not hesitate to say (*Ibid.* p. 14,) was "not strictly critically accurate." Enough, however, on these points.

I shall now, more directly, refer to the article in the February number of this journal, entitled "Mr. Travis justified and condemned." It strikes me that the justification of Mr. Travis would, as far as *The Legal News*, referred to, is concerned, have been even more marked, had the sentence immediately preceding that quoted by the JOURNAL, been also quoted. I beg to supply it, as follows:—

"Mr. Travis has evidently studied his subject with much care, and his examination of the decided cases, whether his readers agree with his conclusions or not, will be found interesting and valuable."

The tables are very fairly turned, in the JOURNAL's article, against *The Legal News*, in showing that while that journal deprecates "the trenchant style" in which, it alleges, I deal with adverse views, its own style is not, by any means, less trenchant.

Perhaps, after all, the editor of *The Legal News* has been, unwittingly, more favorably impressed with the "trenchant style," to which he refers, than he has been inclined to admit; and the statement of one of the able journals of Ontario,*

* *The Advocate-Adviser*, of Watford, of June 27, 1884.

with reference to my book, that "Those who have hitherto regarded the decision of the Privy Council as infallible and beyond criticism, will change their views after a perusal of the book," may have been literally accurate with respect to the editor of *The Legal News*.

But, while accepting the "justification" of Mr. Travis, as discovered by the JOURNAL, and for which I tender due acknowledgments; the "condemnation" of Mr. Travis, I beg to submit, is by no means so apparent as the JOURNAL seems inclined to think that it is. Of course, not at all unkindly.

With reference to two Privy Council cases, *Dobie v. The Temporalities' Board*, and *Russell v. The Queen*, which I claimed, and still claim, are improperly decided; and my very plain criticism of which has so much shocked some of the weak-kneed members of the profession; Ritchie, C. J. is reported to me, by a prominent lawyer in St. John, as having stated to him just after my book appeared, that "the gravest doubt exists as to the soundness of those two cases." Again. On the argument of the Dominion License case, the same unquestionably learned judge is credited with saying: "I presume it will be scarcely considered high treason in us if we say that *Russell v. The Queen* is not law."

I might here add, on the "condemnation" question, that, in a conversation at Ottawa, in October last, which I had, with, admittedly, one of the ablest lawyers in the Dominion; and from whom I derived the information as to the statement of Ritchie, C. J., as above, the following took place between him and me:—

"Have you read my book?"

"Yes; with great pleasure and profit."

"Do you agree with it?"

"Yes; with every word."

"Including what I say about those two Privy Council cases?"

"Yes; most certainly!"

From the same gentleman, who was present, in an important position, on the argument of the Dominion License Act case, I learned, in the same conversation named above, that it was then his expectation that the Supreme Court would hold precisely as they have since done; and that they would so hold on the authority of what they considered was the holding of the Privy Council in *Hodge v. The Queen*.

I asked him if the attention of the Court had been called to the fact, that, in *Hodge v. The Queen*, while the right of the local legislatures to make regulations of a mere local or municipal character, with reference to taverns, was sustained; their lordships carefully guarded themselves by saying, that, in the localities in question, the Canada Temperance Act did not appear to have been adopted; and that there was nothing in that case which over-ruled *Russell v. The Queen*.

He replied, that that point had been strongly insisted on; but that the indications were that the court looked upon the two cases as irreconcilable, and would probably follow what they considered was the holding in the later of the two cases—*Hodge v. The Queen*—which, it seems, they have done. But, as to whether they have been right in so doing, I would beg, very gravely, to question; even though the judgment has been that of Ritchie, C. J., as well as of the rest of the Court.

As to my having expressed an opinion in my book that the License Act is valid; and that my "condemnation" on that point is determined by the holding of the Supreme Court of Canada; I beg to submit that the JOURNAL, in its February article, is in error.

In my book I showed that two entirely different principles are established with reference to the validity of the Canada Temperance Act, by the Supreme Court of Canada, in the *City of Fredericton v. Barker*; and, by the Privy Council, in *Russell v. The Queen*. I, then, p. 181 of my book, applied

the tests derived from these cases to ascertain, whether, *under those tests*, the License Act were or were not valid; and concluded—and I think from that conclusion there is no escape—that, *under either of those tests*, the Act is *intra vires*. What I then stated, as to the application of the test under the holding in *Russell v. The Queen*, is as follows,—

"By what we think, as we have plainly intimated, is the absurd Privy Council test, the Act is undoubtedly good; from the fact, alone, that the several legislatures could not pass it, being an Act for the whole Dominion; which is, as we have seen, according to the Privy Council, equivalent to a declaration that Parliament can pass it; and, therefore, assuming that the Privy Council's test is a sound one, or, *adopting it as an authoritative statement of the law*, the License Act of 1883 would be *intra vires* Parliament. But, we confess that we shall be somewhat surprised if the Privy Council themselves do not abandon their rule; which, we think we have clearly shown, is utterly unsound and worthless."

I then applied the test from what I considered the wiser holding of the Supreme Court of Canada, in the *City of Fredericton v. Barker*, and found, that, *under that test*, the Act was also good.

As I learn, the Supreme Court of Canada have not "condemned," but have quite agreed with me; and are of the opinion that *Dobie v. The Temporalities' Board* and *Russell v. The Queen* are wrongly decided; and, therefore, that any test derived from these cases, is, like the cases themselves, as I claimed, "utterly unsound and worthless." And, further, that they did not test the validity of the Act under their own holding in the *City of Fredericton v. Barker*, but followed what they conceived to be the holding of the Privy Council in *Hodge v. The Queen*. So, that, not having tested, as I did, the Act under their own decision; and having, as I am advised, declined—according here, too, to what I predicted in my book must necessarily be the case—to follow the decision in *Russell v. The Queen*, they are very far, in their decision, from having "condemned" me; but, I submit, very much the reverse.

This much, though, I will say, with all deference, that I cannot escape the conclusion that they have utterly misconstrued the holding in *Hodge v. The Queen*; and that the decision which, "without rhyme or reason," they have given, uncoupled with any statement of their grounds, and by which decision they, in effect, dissent from the holding in their own case of the *City of Fredericton v. Barker*, as well as from that of the Privy Council, in *Russell v. The Queen*; while it utterly unsettles the law as previously established, is also entirely worthless (given in the bald—not to say "prudent"—way, that it has been) as regards the establishing of any sound or intelligible principle of construction of the B. N. A. Act, 1867.

To my mind, in such a state of affairs, no other course is open to Sir John A. Macdonald, than to refer the whole matter to the Judicial Committee of the Privy Council, for their decision; when it is to be hoped there will sit, at that Board, such brilliant lawyers as Lord Selborne, Lord Cairns, Brett, &c.; and not such mere nonentities; old broken-down East-India-men, &c., as sat there in establishing the monstrous doctrines laid down in *Dobie v. The Temporalities' Board*, and *Russell v. The Queen*; holdings which are beneath contempt, and which, it is confidently submitted, can be no more followed by the Privy Council themselves, than they could by the Supreme Court of Canada.

J. TRAVIS.

THE
MANITOBA LAW JOURNAL.

VOL. II.

APRIL, 1885.

No. 4.

INJUNCTIONS TO RESTRAIN LIBEL AND
SLANDER.

BY the Common Law Procedure Act of 1854 (17 & 18 V. c. 125, s. 79) it is provided that "in all cases of breach of contract, or other injury, where the party injured is entitled to maintain and has brought an action, he may, in like case and manner as hereinbefore provided with respect to mandamus, claim a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and he may also in the same action include a claim for damages or other redress."

By sec. 82 an *ex parte* injunction may be granted "to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right."

The power of the common law courts under these clauses was much wider than that exercised by the equity courts. But the power was seldom employed. The common law judges had been accustomed to award damages for past offences and were diffident in issuing regulations for future conduct. Practically, therefore, the equity judges monopo-

lized the enjoining power ; and in order to retain their sway did not fear to widen the scope of their operations, so as to include the field nominally occupied by their brethren of the law. And in this we hold them justified. Courts of equity never awarded or withheld injunctions according to statutory rules or regulations, but, from time to time, adding precedent to precedent, the courts endeavored to meet the growing necessity for a commanding and prohibiting system of jurisprudence. Without the assistance of legislation, the jurisdiction was extended from one subject to another, and when the legislature had approved of the extension and granted still wider powers to the courts of law, equity judges might well extend their relief up to the statutory limit. *Equitas sequitur legem.*

Springhead Spinning Co. v. Riley, L. R. 6 Eq. 551, marked a distinct advance. In that case, Malins, V. C., (a strong judge, often overruled by more timid brethren) granted an injunction enjoining the posting of placards which were calculated to intimidate workmen from hiring themselves to the plaintiffs, the ground for the order being that the effect of the placards was to destroy the property of the plaintiffs.

In *Dixon v. Holden*, L. R. 7 Eq. 488, the same judge made perpetual an injunction restraining the publication of a notice which alleged falsely that the plaintiff was a partner in a bankrupt concern. In the course of his judgment the learned judge said : " In the decision I arrive at I beg to be understood as laying down that this court has jurisdiction to prevent the publication of any letter, advertisement or other document which, if permitted to go on, would have the effect of destroying the property of another person, whether that consists of tangible or intangible property, whether it consists of money or reputation."

In *Mulkern v. Ward*, L. R. 13 Eq. 619, Sir John Wickens, V. C., refused a motion on behalf of the trustees of a permanent benefit building society (being also a bank of deposit,) for an injunction to restrain the publication and sale by the defendants of a book containing alleged libellous paragraphs

in reference to the annual balance sheets and solvency of the society. In referring to *Dixon v. Holden*, the Vice-Chancellor said :—" It is not for me to say that the rule so laid down is erroneous ; but I think it was wholly new, and that nothing whatever was said in the case of *The Emperor of Austria v. Day*, or in any other case, except possibly in the peculiar and very different case of *Springhead Spinning Co. v. Riley*, which supports it in any way."

In *Prudential Assurance Co. v. Knott*, *L. R. 10 Ch. App. 142* ; *Dixon v. Holden*, and *Springhead Spinning Co. v. Riley*, were expressly overruled. The Lord Chancellor (Cairns) affirmed that " it is clearly settled that the Court of Chancery has no jurisdiction to restrain a publication merely because it is a libel."

In 1873 the Judicature Act was passed in England. By it the Court of Chancery acquired the jurisdiction vested in the common law courts under the sections of the Common Law Procedure Act already quoted. This section would undoubtedly have justified the court in returning to Vice Chancellor Malins' view of the law, but its potency does not appear to have been at once observed.

The first case after the introduction of the Judicature Act appears to be that of *Thorley's Cattle Food Co. v. Massam*, *6 Ch. Div. 582* ; *14 Ch. Div. 762*. Joseph Thorley had extensively advertised and sold a compound under the name of "Thorley's Food for Cattle." The process of manufacture was not patented and was known not only to Mr. Thorley but also to his brother, who managed the business. After Joseph died, the business was continued by the defendant, his executor, but the surviving brother withdrew from the management, organized the plaintiff's company, and began the manufacture of the same food compound and under the same name as before. Thereupon the defendant, by circulars cautioned the public against purchasing any of "Thorley's Food for Cattle" not made by his establishment, "the proprietors of which were alone possessed of the secret for compounding the famous condiment." The defendants rested their case on *Prudential*

Assurance Co. v. Knott, supra. The Vice Chancellor, Malins, said he should have no hesitation in stopping the defendant's act except for that case, and he was inclined to agree with a suggestion of the plaintiff's counsel that that case was controlled and superseded by the Judicature Act. But as the point was a new one he preferred to reserve his views until the hearing. When the cause came on for trial he granted the injunction, but did not refer to the effect of the statute; nor was it discussed by any of the judges on appeal, when the decree was affirmed. The opinions by James, Baggally and Bramwell are short, and no case is cited in either of them. Malins cited several cases of law and remarked, 'I think these cases establish this—I do not go into the general question of libel—but they have established the doctrine that where one man publishes that which is injurious to another in his trade or business, that publication is actionable; and, being actionable, will be stayed by injunction, because it is a wrong which ought not to be repeated.' The judges on appeal apparently go on the same ground.

The point was clearly raised and decided in *Beddow v. Beddow*, 9 Ch. Div. 89, the head note of which is as follows: "The extensive jurisdiction of granting injunctions originally given to the common law courts by the Common Law Procedure Act, 1854, ss. 79, 81 and 82, is now vested, by virtue of the Judicature Act, 1873, in the High Court of Justice. All acts, therefore, which a common law court, or a court of equity only, could formerly restrain by injunction, can now be restrained by the High Court. The jurisdiction of granting injunctions thus vested in the High Court is practically unlimited, and can be exercised by any judge of the High Court in any case in which it is right or just to do so, having regard to settled legal reasons or principles." See also *Hill v. Hart Davies*, 21 Ch. Div. 708.

To entitle the plaintiff to an injunction restraining the publication of a libel, it has been held that it must not merely be "untrue and injurious to the plaintiff," but "there must be also the element of *malicia fides* and a distinct inten-

tion to injure the plaintiff apart from the honest defence of of the defendant's own property." *Halsey v. Brotherhood*, 19 Ch. Div. 386.

Hermann Loog v. Bean is the latest case upon the subject. In that case it was held that:—an injunction may be granted to restrain oral slanderous statements concerning another's business, and in such case it is not necessary to show actual loss. This jurisdiction, however, should be exercised with great caution. B. was employed to manage one of L.'s branch offices for the sale of machines, and resided on the premises. He was dismissed by L., and on leaving gave the postmaster directions to forward to his private residence all letters addressed to him at L.'s branch office. He admitted that among the letters so forwarded to him were two which related to L.'s business, and that he did not hand them to L. but returned them to the senders. After his dismissal he went about among the customers making oral statements reflecting on the solvency of L., and advised some of them not to pay L. for machines which had been supplied through himself. L. brought an action to restrain B. from making statements to the customers that L. was about to stop payment or was in difficulties or insolvent, and from in any manner slandering L. or injuring his reputation or business, and from giving notice to the post office to forward to B.'s residence letters addressed to him at L.'s office, and also asking that he might be ordered to withdraw the notice already given to the post office. An injunction was ordered.

The law upon this subject in the United States forms the latter half of an important article in *The American Law Register* for November, 1884. It is as follows:—

"The way now seems clear for saying, confidently, that the English decisions regarding restraints upon trade-libels in cases arising subsequent to that of *Prudential Assurance Co. v. Knott* (decided just before the Judicature Act of 1873 went into operation), are not generally applicable to cases of trade-libel in this country. In England, as we have seen,

the remedial power of injunction has been made almost, if not quite, co-extensive with the right to maintain an action at law; but one needs not to be reminded that, in the absence of special local statutes, the law is otherwise in the United States. The point seems obvious enough, and yet we apprehend that it is a point one may easily overlook when citing English cases for the purpose of guiding our courts in the development of the doctrine under discussion.

“What, let us now inquire, is the law where courts are governed solely by the general principles of equity jurisprudence? Prior to the Judicature Act of 1873, *Prudential Assurance Co. v. Knott*, *supra*, was the law in England, and the same reasons which supported its doctrines there make it now an authority here. The Supreme Court of Massachusetts cites it with approval in *Boston Diatile Co. v. Florence*, 114 Mass. 69, and in *Whitehead v. Kitson*, 119 Id. 484. Both of these cases, to be sure, were decided before the Act of 1877, which gave the court full chancery powers; but there is no reason to suppose that its jurisdiction was thereby enlarged with respect to the doctrine in question. In New York the law cannot be said to be settled. *The New York Juvenile, &c., Society v. Roosevelt*, 7 Daly 188 (1877), follows *Prudential Assurance Co. v. Knott*, and *Brandreth v. Lance*, 8 Paige 24 (1839), is in accord with the same doctrine. So, too, is the case of *Mauger v. Dick*, 55 How. Pr. 132 (1878, Sup. Ct.), which cites with approval the first of the two Massachusetts cases, and Speir, J., remarked: ‘The jurisdiction of a court of equity does not extend to false representations as to the character or quality of the plaintiff’s property or to his title thereto, when it involves no breach of trust or contract; nor does it extend to cases of libel or slander.’

“In *Wolfe v. Burke*, 56 N. Y. 115, and *Hovey v. Rubber Tip Pencil Co.*, 57 Id. 119 (1874), the facts were such that it was not necessary to pass upon the question, so that the cases are not authorities either way. In the latter the court refused to grant an injunction: first, because the issues

presented questions arising under the United States Patent Laws, and hence not within the jurisdiction of the State courts; and second, because the defendant had acted with reasonable fairness in the defence of his supposed rights. The inference that may be drawn from the last ground is not of much consequence, but the case of *Croft v. Richardson*, 59 How. Pr. 356, decided in the State Supreme Court in 1880, is unquestionably opposed to the other New York decisions. The defendants were sending threats and warnings to the plaintiff's customers, alleging that a carpet exhibitor made and sold by the plaintiffs was an infringement of the defendant's patent, and that the plaintiffs were intending 'to make a considerable profit before legal proceedings put a stop to their nefarious efforts.' A motion for an injunction was granted, the judge relying upon the *Thorley Food Case* (then just reported in the Albany Law Journal), and remarking that the language of the circular was too excessive and ill-chosen to convey the simple information that the plaintiffs had no right to make and sell the article of which they claimed to be the patentees. This decision, so far as we have been able to learn, stands alone among the few American cases. Of its authority it may be said, first, that the opinion was not given by a judge of the highest court; and second, that the case upon which it was founded was not (for reasons already given) applicable in the state of New York. *The Celluloid Manuf. Co. v. The Goodyear Dental Vulcanite Co.*, 13 Blatch. 375 (Southern Dist. of N. Y.), contains a reference to the earlier English cases, but decides nothing. The only other decisions in the United States that we are aware of are; *Caswell v. Central Railroad and Banking Co.*, 50 Ga. 70, and *Life Association of America v. Boogher*, 3 Mo. App. 173 (1876), both of which state the law in accordance with the doctrine of the Massachusetts cases. The ground of the decision, however, in the Missouri case is peculiar. To stop the circulation of the printed matter, 'libellous as it might be, would be to violate the State constitutional provision that 'every person may freely speak, write or print on any subject, being

responsible for the abuse of that liberty.' The responsibility laid in the qualifying clause was held to be only such as the courts may enforce, civilly or criminally, *after* the abuse has occurred. The question would seem to us to have been brought before the Missouri court apart from any consideration of the constitutional provision, and to have raised just the points that are involved in the decision of the main question by any court of general equity jurisdiction; but the judges in the case chose a short cut to a determination of the matter in the way we have here indicated.

" The following, if not an exhaustive list of the classes of cases in which injunctions are granted to prevent the commission of a tort, certainly contains every class in which, by analogy, such cases as we have been considering might fall: waste, trespasses, nuisances, infringement, patents and copyrights, literary property (including works of art), as distinct from copyright trade-marks. *See Pomroy, vol. iii., ss., 1346-1358.* The principle which will thread them all is, that a court will act in behalf of private as distinguished from public interests only where it may prevent a *direct and immediate* injury to some species of property. The mere analogy of preventing trespassers or any of the wrongs here enumerated, is not enough to warrant an exercise of the jurisdiction. Perhaps a court would be justified in interfering in favor of one injured by false statements persistently made, which lessened the value of his goods by slandering his title to them. The analogy presented by such a case might be sufficiently close to the principle of the cases which received the protecting power of injunction; but the jurisdiction could not be stretched further across never so slight a distinction, without admitting the whole line of cases which come within the scope of the English doctrine.

" It is to be regretted that the line is drawn thus sharply, for one may fairly say, the greater protection afforded by the English courts is demanded by a just regard for the vastness and variety of our commercial interests. Our jurisprudence must in some way meet that demand. In

course of time the result might slowly be worked out by the judges unaided by assistance from the legislators, but an immediate development reaching to the desired end could not be effected without a palpable violation of judicial functions. Legislation therefore is needed, and needed now. Let the law-makers take the matter in hand, recognizing fully the defect of the common-law theory which justifies interference with individual freedom not until after the person has actually committed a wrong, and enact for us statutes which shall embody substantially the provisions of the judicature acts. 'The ideal remedy,' say Professor Pomeroy, 'in any perfect system of administering justice would be that which absolutely prevents the commission of a wrong—not that which awards punishment or satisfaction for a wrong after it is committed.'"

What the law of Manitoba may be we are not in a position to state. If the court in granting an injunction "in equity" can exercise the same jurisdiction as if its order was headed "at law," then there is no doubt that "the greater protection afforded by English courts" can be awarded here. Perhaps any deficiency of jurisdiction may be supplied by the court directing the insertion of the words "at law" at the top of the page embodying their injunction. *Re Fisher v. Brown*, 1 *Man. L. R.* 116.

LAW STAMPS.

THE report of the case of *The Attorney General for Quebec v. Reed*, *L. R. 10 App. Ca. 141*, has come to hand. There can be no longer any doubt that the profession in Manitoba can cease subscribing revenue to the Provincial Government as soon as they chose to do so. The Stamp Act is clearly *ultra vires*. It is an indirect tax, and, as such, is not warranted by the B. N. A. Act.

CONVINCING THE COURT.

IN theory, the proof of a legal proposition is effected by establishing in argument the existence of a law to which the proposition may be referred. In practice, however, argument is very often more effectively directed to what the law ought to be, than to what it is. It may, therefore, be laid down as a good general rule, that a strong effort must be made to—

Convince the court that the law ought to be in your favor, that it is unfortunate if it should be found to be out of harmony with common sense. Be careful, however, not to imply, that the law is one way and ought to be another. You must *assume* that it is as it ought to be; show what it ought to be; and *then* prove that it is so. Do not understand by this that your argument should reveal your design. A judge would cease to follow if you appeared to be asking him to formulate new law; while, at the same time, if the "ought-to-be" and "is" are skilfully interwoven, you will produce a piece of workmanship through which your opponent will fail to work a hole, let him pull and tear at it as he may. This may appear to be a recommendation to humbug the judge—to give him an "ought-to-be" pill safely coated with "is" sugar. But this appearance is explained by the fact that while a judge may not legislate directly, he frequently accomplishes the same object by so construing doubtful law as to bring it into harmony with the dictates of reason.

Many persons have listened to the finest exhibitions of advocacy, and while convinced by the argument have failed to observe its construction: their minds are completely satisfied, but they would be utterly unable to produce the same effect. And while we believe that the ideal advocate, as the ideal artist, is born and not made, we believe, also,

that a careful study and practice of the rules governing the production of effects, will enable anyone of ordinary intelligence to take high rank either at the bar or the academy.

Keeping in mind, then, the nature of the warp and woot of an argument, let us observe the method of their application. The plaintiff has recovered a verdict upon a note made by four directors, A., B., C. and D., for goods supplied to their company. The contract was made with D., who was the managing director of the company, and D. procured the note to be signed, and handed it to the plaintiffs. At the time of delivery the words "jointly and severally" appeared upon the note interlined between the words "we" and "promise." D. having died, the action and verdict are against the other three directors, all of whom have sworn that at the time when they signed the note the words "jointly and severally" were not upon it, and were not added with their knowledge or consent. There is no contradiction of this evidence; and the question is, whether under such circumstances the plaintiff can hold his verdict. Is it possible that the defendants can be liable upon a note altered after signature, in a material feature, without their knowledge. You are of counsel for the plaintiff, and you contend that they are liable. How should you proceed?

It will be well at first to clear the ground a little, and in a few words to impress the court with the possibility that this case may not be within the general rule. Their lordships are perfectly familiar with the rule, and it is too well settled to be shaken; but, What is the extent of its application? Does it cover cases, you ask, where the note has been altered *before as well as after negotiation*? Their lordships hesitate a little. There may be a distinction here, but you must hurry on, for the court will soon settle that point unfavorably to you unless you can show how the time of alteration may be material in another respect. While the court hesitates, keep their lordships' minds open by introducing a wedge; "If the note was altered before

negotiation, may not the defendants be liable upon the note in its original form?" *Of course you would not contend that they were liable upon the note as altered.*

You have now got to a safe stage, and may take a little breathing spell. *The general rule may not be applicable.* Down to this period of your address all argument upon the "ought-to-be" would be entirely irrelevant, and worse than irrelevant, it would be positively injurious; and if you had indulged in it you would probably have succeeded in extorting from the bench some strong indications of dissent and disapprobation—you would have induced an antagonistic frame of mind. You would have been butting your head against a stone wall, and their lordships would have all agreed that your head was getting decidedly the worst of the contest. You must cut a log into planks before your smoothing plane is of much use, and you must show the law to be debatable before your "ought-to-be" arguments can be brought into action.

An opportunity, however, has now arrived, and you seize it at once. There is no reason, you say, why the defendants should not be liable to the extent to which they intended to be liable. The note was not altered by the plaintiff or while in his custody. He gave value for it. If the defence be good, a person entrusted to deliver a note may, without the knowledge of either the maker or the payee, cancel the obligation which both intended to exist. You must not dwell too long upon considerations of this kind, and you must not appear to be referring to them at all for the real purpose you have in view. They must be thrown in, shortly but strongly, as helping to show *the reasons for the distinctions in the cases to which you now propose to draw the court's attention.*

Very much depends upon what the cases may say, but *very much more depends upon what the judges think they ought to say.* If the cases agree with the judges' opinion they will be "undoubted authority"; but if they do not,

they will be shown to be "not in accordance with the earlier cases," to have been "in effect overruled by the later cases," to be "capable of explanation upon other grounds," or "to be taken as mere dicta"—"at all events we do not feel ourselves bound by their decisions." A Jessel would dispose of them all in this way: "Then the argument being exhausted—or for lack of argument—recourse is had to authority, and three cases have been cited. All I can say is, I do not understand them. It is no use my commenting on them, I cannot make out any principle on which they were decided, and I confess I do not understand them. As I have often said, I cannot follow an authority unless I understand its principle. If a case lays down a principle it is a guide to other judges, but a mere decision where you cannot find out the principle is of no use at all. The only use in citing an authority is as an illustration of some principle or rule of law, but where none is to be found and none to be extracted from the case cited, it is utterly useless for the purpose of a judge, however desirous he may be of following it." *Talbot v. Frere*, 9 Ch. D. 574.

Before citing your authorities you must formulate your proposition. You are asking the court to take a certain view of the cases which you are about to quote. What is exactly the rule, or rather the exception to the rule, that you seek to establish? Put it in words. Let it not be too long or too loose. Dress it nicely and make it look plausible. Let it be clear, reasonable and practicable. A great deal will depend upon the appearance of your proposition. Judges will shy at it if it sound incongruous, illogical, or subversive of any settled notion or usual line of action.

Having stated your proposition you turn to the books. You have kept back the cases until you are sure their lordships' spectacles are in proper condition. Your opponent would fain have them a different color from the shade you have imparted to them, but he must wait until you have put every case of importance before the court, and until their

lordships have obtained their impression of it under your guidance. But you must be very candid and fair. You may supply the spectacles but you must not obliterate the page. You may set a case in a certain light, but you must not distort the object itself. You are now putting in the keystone, and if you do it well the arch will stand your opponent's assault; but it will go down as a pack of cards if your pretended stone can be shown to be sand and water. Be careful, therefore, and be frank. Leave nothing wherewith your adversary may startle their lordships out of the settled and satisfied condition in which you intend to leave them. You cannot, perhaps, prevent him spoiling your spectacles. They have served their purpose, and they may go. But you can, and you must forestall him in the presentation of every picture from historic litigation; and, above all, you must deal fully and fairly with his strongest cases. In referring to them you must give their lordships, if you can, some clear ground of distinction. For this purpose you must have read carefully not only the judgments but that which will supply you with what you want, the statements of the facts. These may be long, intricate and tiresome, but you must be thoroughly familiar with them, and able with their assistance to explain the exact significance of the words which seem to tell against you.

It is not necessary, however, or advisable to cite your opponent's cases before your own. If you have succeeded in the first part of your argument their lordships are ready to take your view of the law, and they are longing to see their opinions confirmed by your books. Produce your books then, and let no hint of opposing law disturb the air while you mould the heated iron. When it is cold it will stand a good deal of hammering without much injury. But do not leave fuel for another fire. Exhaust all the enemies' material, for you have no reply, and their lordships may, if they find themselves misled, resent the improper twist that you have given to their opinions, and make the rule absolute with costs. *Be frank.*

FOAKES v. BEER—STARE DECISIS.

A NOTABLE example of the uncertainty of the best known of our legal propositions is furnished by the recent case in the House of Lords—*Foakes v. Beer*, 54 L. J. N. S. Q. B. 130. We had thought that if there was any unimpeachable proposition of law it was “that payment of a lesser sum, on the day, in satisfaction of a greater, cannot be any satisfaction for the whole.” This was laid down in *Pinnel’s Case*, Co. Lit., 212 b., in 1602; the reason given being, “because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum.”

We were aware that a very slight appearance of benefit to the creditor—for instance, payment of a smaller amount the day before the due date; a payment of a smaller amount at a place other than that agreed upon; or the making and delivery of a negotiable note—took the case out of the rule, but the rule itself seemed beyond controversy. After 280 years, however, it has reached the House of Lords, and it has had a narrow escape. Their Lordships seem to agree that Sir Edward Coke was wrong, but the majority thought that although the doctrine “may have been criticized as questionable in principle by some persons whose opinions are entitled to respect, it has never been judicially overruled; on the contrary, it has always, since the sixteenth century, been accepted as law.” “If so, I cannot think (said the Lord Chancellor) that your Lordships would do right if you were now to reverse as erroneous a judgment of the Court of Appeal proceeding upon a doctrine which has been accepted as part of the law of England for 280 years.”

Lord Blackburn was of opinion that the point was open for re-consideration, but in deference to the other judges

concurred in allowing it to stand. We think that everyone will agree with the noble Lord when he says: "What principally weighs with me in thinking that Lord Coke made a mistake of fact, is my conviction that all men of business, whether merchants or tradesmen, do every day recognize and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is solvent and sure to pay at last, this is often so. Where the credit of the debtor is doubtful, it must be more so."

We need hardly add that the rule has no application in cases of compromises with creditors, where the agreement to abate by one is the consideration for the abatement by the others; nor where there is a release under seal.

A point might arise in this Province, owing to the large amount of property exempt from execution, whether in case after default in payment the debtor agrees to sell some of the exempted property and out of the proceeds to pay a smaller sum in satisfaction of a larger, there would not be a sufficient consideration to support an agreement by the creditor to accept the amount in full. If it were held to be sufficient then if the debtor borrowed the money upon the security of his exempted property the same rule would apply. When Lord Coke's rule was formulated there were no exemptions, and the debtor went to prison in default of payment. A means, therefore, was provided of stripping him of every dollar he owned, *he had no power to keep back anything*, and for this reason it was held that there was no consideration for an agreement allowing him to do so. But in Manitoba the law does permit the withdrawal of a certain amount of wealth from the creditor, and there is consideration, therefore, for an agreement to apply it, either directly or indirectly, in payment of a debt.

THE
MANITOBA LAW JOURNAL.

VOL. II.

MAY, 1885.

No. 5.

DISTRIBUTION OF ASSETS.

THE difference between the English and Ontario statutes abolishing the distinction as to priority of payments between specialty and simple contract creditors of deceased persons, is important.

IN ENGLAND the gist of the statute (32 & 33 Vic. c. 46,) is, that "no debt or liability . . . shall be entitled to any priority or preference by reason merely that the same is secured by, or arises under, a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding: Provided always, that this act shall not prejudice or affect any lien, charge or other security which any creditor may hold (or be entitled to) for the payment of his debt."

IN ONTARIO the wording of the statute (Rev. Stats. Ont., c. 107, s. 30) is as follows:—"On the administration of the estate of any deceased person, in case of a deficiency of assets, ~~assets~~ due to the Crown, and to the executor or administrator of the deceased person, and debts to others, including therein respectively debts by judgment,

decree or order, and other debts of record, debts by specialty, simple contract debts, and such claims for damages as by statute are payable in like order of administration as simple contract debts—shall be paid *pari passu* and without any preference or priority of debt of one rank or nature over those of another; but nothing herein contained shall prejudice any lien existing during the lifetime of the debtor, on any of his real or personal estate.

PRIORITY.—Under the English statute a creditor obtaining judgment against an executor before any decree is made for administration is entitled to priority over creditors whose claims are not in judgment. *Re Williams L. R. 15 Eq. 270*; *Re Stubbs, 8 Ch. Div. 154*.

In Ontario, if a creditor recover judgment against an executor and obtain payment in full, he will, in case of deficiency of assets, have to account to the other creditors to the extent to which he has received more than his *pro rata* share of the estate. *Bank of B. N. A. v. Mallory, 17 Gr. 102*.

PREFERENCE.—Under the English statute an executor may, at any time prior to a decree for administration or the appointment of a receiver, prefer any one or more creditors to the others. *Re Radcliffe, 7 Ch. Div. 753*; *Snell's Equity, 263-4*; *May on Fraudulent Conveyances, 89*.

In Ontario, preference would amount to a *devastavit*. *Bank of B. N. A. v. Mallory, ante*; *Willis v. Willis, 20 Gr. at p. 400*.

RETAINER.—Under the English Act, the right of retainer by an executor has not been abolished, nor has it been enlarged so as to enable an executor to retain his debt as against a creditor of higher degree than himself. An executor, therefore, who is only a simple contract creditor of his testator, cannot retain his debt as against a specialty creditor. In such a case the effect of the statute is somewhat curious. The assets must be apportioned on the footing of giving an equal dividend to all the creditors—specialty as well as simple contract creditors; the dividend must then be paid in full to the specialty creditors; the executor then retains

his debt; and the residue is divided among the simple contract creditors. *Wilson v. Coxwell*, 23 Ch. Div. 764. This case may, or may not, turn out to be a sound exposition of the statute. There is, certainly, a strong argument against it. The Act expressly saves the right of any creditor entitled to "any lien;" and, as it appears to us, says, that subject to "any lien, charge or other security," all creditors, "as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets." The effect of the above decision, on the other hand, is, that creditors are not "treated as standing in equal degree," but as in different degrees; and that while specialty creditors may be paid in full, the simple contract creditors may get nothing. Let us suppose that the debts altogether amount to \$20,000, of which there is due to the specialty creditors \$10,000, to the executor \$9,000, and to one simple contract creditor \$1,000. The assets are \$10,000, which will pay a dividend of fifty cents in the dollar. The specialty creditors get their dividend in full, taking one half of the assets, and the executor takes the whole balance of the estate. This is hardly treating the creditors "as standing in equal degree," and paying them accordingly.

In Ontario, by the very wording of the statute, the right of retainer is displaced. *Re Ross*, 29 Gr. at p. 391.

RAILWAY CARRIERS OR WAREHOUSEMEN.

McCAFFREY v. C. P. R. Co.

IN this case (*1 Man. L. R. 350*) the facts were as follows : In the month of April, 1882, plaintiff's wife purchased from the G. W. R. Co. in the City of Toronto, tickets for the conveyance of herself and children from Toronto to Winnipeg, over certain lines of railway, including that of the defendants. At the time of purchasing the tickets, she had her baggage checked, in the usual way, through from Toronto to Winnipeg. She reached Winnipeg on the 24th of April, and on the following day she and the plaintiff went to the railway station to get her baggage, and there saw the trunk, the loss of which was the subject of the action. Her other trunks had not at this time arrived, and acting, as she said, on the advice of some person at the station, she did not take it away, but left it to await the arrival of the others. A day or two after, the other trunks arrived and were taken away by the plaintiff and his wife. The trunk which first arrived had, however, in the meantime disappeared and was never received by the owner. The court held that the defendants were not liable as warehousemen, because it did not appear that they had charged or were entitled to charge storage ; but held, without giving reasons for the opinion, that the defendants were liable as common carriers. We think that this latter point will stand a little investigation.

There is no doubt that "it is the duty of a railway company with regard to the luggage of a passenger, which travels by the same train with him, but not under his control, when it has reached its destination, to have it ready for delivery upon the platform at the usual place of delivery, until the owner, in the exercise of due diligence, can receive it ; and the liability of the company does not cease until a rea-

sonable time has been allowed to do so." *Patscheider v. G. W. R. Co.*, 3 *Ex. Div.* 153. In that case it appeared that a lady's maid was travelling with her mistress on the defendant's line. On arrival at the station the plaintiff saw her box taken from the luggage van and placed on the platform with other luggage of her mistress. She then told the porter of her hotel to take the luggage to the hotel, but the box was not among the luggage brought up by him. The evidence as to what took place after the box was taken from the van and placed upon the platform was conflicting, but the jury found that there had been no delivery. The defendants were held to be liable as carriers. *Cleasby, B.*, in giving judgment, said: "As far as regards any question of law to be laid down upon the subject, I should have no hesitation in saying that the mere throwing the box out upon the platform, mixed, as it might be, with other luggage, was not a delivery, or a discharge of the defendant's obligation. It can hardly be contended that could be so; but it must be placed there and kept until the passenger has the opportunity of calling for it and receiving it." See also the following cases taken from an article in the *Am. Law Reg.* vol. 24, p. 181: *Vanhorn v. Kermit*, 4 *E. D. Smith*, 453; *Ross v. M. K. & T. Rd.*, 4 *Mo. App.* 583; *Roth v. Rd.* 34 *N. Y.* 548; *Louisville Rd. v. Mahan*, 8 *Bush.* 184; *Holdridge v. Rd.*, 56 *Barb.* 191; *Jones v. Transportation Co.*, 50 *Barb.* 193; *Minor v. C. & N. M. W. Rd.*, 19 *Wis.* 40; *Louisville Rd. v. Mahan*, 8 *Bush.* 184; *Fairfax v. N. Y. C. Rd.*, 37 *N. Y. (S. C.)* 516, 43 *Id. (S. C.)* 18; *Warner v. Rd.*, 22 *Iowa*, 166; *Bartholomew v. Rd.*, 53 *Ill.* 227; *Curtis v. Rd.*, 49 *Barb.* 148; *Burnell v. N. Y. C. Rd.*, 45 *N. Y.* 184; *Ouimet v. Henshaw*, 35 *Vt.* 604.

The subsequent case of *Hodkinson v. The London and North Western R'y Co.*, *L. R.* 14 *Q. B. Div.* 228, is more instructive. The head note is as follows: "The plaintiff arrived at a station on the defendant's railway with her luggage contained in two boxes, which were taken from the luggage van by a porter in the employ of the company. The porter asked the plaintiff if he should engage a cab

for her. In reply she said she would walk to her destination, and would leave her luggage at the station for a short time, and send for it. The porter said "All right; I'll put them on one side and take care of them;" whereupon the plaintiff quitted the station, leaving her boxes in the custody of the porter. One of them was lost. *Held*, that the transaction amounted to a delivery of the luggage by the company to the plaintiff, and a re-delivery of it by her to the porter as her agent to take care of, and that consequently the company were not responsible for the loss."

It appears to us that this latter case is sound. As a carrier, the railway company assumes a heavy responsibility. The company as a carrier is an insurer of the goods. But the owner has no power to continue that responsibility beyond a reasonable time after the carriage is at an end. In the case of ordinary luggage carried on the same train as its owner, a "reasonable time" cannot surely be extended beyond the day following its arrival. And if the owner on that day goes to the station, sees the luggage and chooses to leave it there, we think that the carriage is at an end, and that the company if liable at all must be so as warehousemen or as gratuitous bailees, in which cases negligence or gross negligence would be the test of their liability, and not merely the fact of loss.

THE 17TH SECTION¹ OF THE STATUTE OF
FRAUDS.

29 Ch. II. c. iii. s. 17. (A. D. 1676.)

And be it further enacted : That no contract for the sale of any goods, wares and merchandises for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized.

[We make no apology for giving the profession in Manitoba the benefit of Mr. Justice Stephens' digest of the law upon this important section. It has appeared in the first number of *The Law Quarterly Review*, (Stevens & Sons, Lon. Eng.), a periodical with pretensions far in advance of the ordinary law journal.]

THE 17TH SECTION OF THE STATUTE OF
FRAUDS REDRAWN,

SO AS TO SHOW THE EFFECT OF THE DECISIONS
UPON IT FROM 1676 TO 1878.

ARTICLE I.

Contract for Sale of Goods defined.

The word 'goods' is hereinafter used in the sense stated in Article 3.

A sale of goods is the transfer of the property in goods for a price in money by the vendor to the purchaser².

A contract for the sale of goods is a contract by which the vendor promises to transfer to the purchaser, and by

¹ 16th in the Statutes of the Realm and Revised Statutes. ² See Benj. I.

which the purchaser promises to accept from the vendor, a transfer of property in goods, whether the goods are delivered at the time of the contract or are intended to be delivered at some future time, and whether the goods are, at the time of the contract, actually made, procured, or provided, or fit or ready for delivery or not, and whether or not any act is requisite for making or delivering or rendering them fit for delivery¹.

[Submitted.] A contract by which one person promises to make goods for another, and by which the other promises to pay a price for such goods when they are made, is a contract for the sale of goods².

A contract by which one person promises to make something which when made will not be his absolute property, and by which the other person promises to pay for the work done, is a contract for work, although the payment may be called a price for the thing, and although the materials of which the thing is made may be supplied by the maker.

¹ *Lee v. Griffin*, 1 B. & S. 272; 30 L. J., Q. B. 252, reviewing earlier cases; and see Benj. 99-103, 3rd ed. The latter part of the paragraph is the equivalent of 9 Geo. IV., c. xiv. s. 7, with slight verbal alterations to adapt it to the structure of the sentence. The statute of Geo. IV. does not say that the Statute of Frauds is to extend to a case in which the property in the goods is intended to pass at a time subsequent to the contract, but antecedent to the delivery. 'I contract with you to-day that my horse shall become your property to-morrow, that he shall be delivered to you next week, and paid for next month.' Such a contract, I suppose, would be a very unusual one.

² This is somewhat different from the principle stated by Mr. Benjamin in his remarks on *Lee v. Griffin*. The difference lies in the last paragraph of the article. Mr. Benjamin seems to me to explain very clearly one part of the rule, namely, that part which states that a contract is for the sale of goods if the object is to produce a chattel which is to be transferred for a price from the maker to the person who orders it. But this does not quite explain such a case as *Clay v. Yates*, or the case of the solicitor and the deed. The true principal of these cases appears to me to be that neither the book when printed, nor the deed when drawn, is the absolute property of the printer or the solicitor. The author's copyright in the book, and the client's interest in the deed, qualify their proprietary rights. If the printer, being unpaid, were to sell the copies to a publisher, or if the solicitor, not getting his costs, were to

ILLUSTRATIONS.

1. A promises to make a set of false teeth for B, and B promises to pay for them when made. This is a contract for the sale of goods¹.

2. A promises to paint a picture of great value for B, A finding the paint and canvas, which are of small value, and B promising to pay for the whole as a work of art. This is contract for the sale of goods².

3. A employs B to print 500 copies of a book, written by B, at 4*l.* 10*s.* a sheet. This is a contract for work, and not for the sale of goods, though B finds the materials³.

4. A employs B, a solicitor, to draw a deed on parchment and with ink supplied by B. This is a contract for work, and not for the sale of goods⁴.

5. A contracts with B that B shall carve a block of marble belonging to A into a statue, A paying a large sum of money as the price of the statue. This is a contract for work, although the word 'price' may be used in it⁵.

ARTICLE 2.

*Contracts for Sale of Goods of value of 10*l.* to be in a certain Form.*

No agreement for the sale of goods of the value ⁶ of 10*l.* or upwards is a contract enforceable by law, unless one or other of the conditions hereinafter specified is observed before the agreement is sued upon.

threaten to destroy the deed, each could be restrained. A book is more than a bare combination of ink and paper. I should say that the materials used in making it had ceased to exist as such, and that the new product was the property of the employer, subject to the printer's lien and other remedies for the price of his labour.

¹ *Lee v. Griffin*, 1 B. & S. 272; 30 L. J., Q. B. 252.

² Per Blackburn J. in *Lee v. Griffin*.

³ *Clay v. Yates*, 1 H. & N. 73; 25 L. J., Exch. 237.

⁴ Per Blackburn J. in *Lee v. Griffin*.

⁵ Suggested as a consequence of *Lee v. Griffin*.

⁶ The effect of 7 Geo. IV. c. xiv. s. 7, is to substitute 'value' for 'price.' *Harman v. Reeve*, 18 C. B. 586, 595; 25 L. J., C. P. 257.

This article includes—

(a) Single agreements for the purchase of more things than one, each under the value of 10*l.*, but collectively worth 10*l.* or upwards¹

(b) Agreements for the sale of goods, and also for other objects, in which the goods sold are worth 10*l.* or upwards².

(c) Agreements for the sale of goods of unascertained value at the time of the sale, which are afterwards ascertained to be worth 10*l.* or upwards³.

ILLUSTRATIONS.

1. A buys several articles at the shop of B, a linendraper, the price of each being separately agreed upon, and desires an account of the sale to be made out. No one article is of the value of 10*l.*; the total value is 70*l.*⁴

2. A agrees to sell a horse to B, and keep it at his own expense for six weeks, after which B is to fetch it away and pay A 30*l.* The agreement for the sale of the horse is within the statute⁵.

ARTICLE 3.

Goods defined.

The word 'goods' in Article 1 includes every kind of tangible moveable personal property, whether such property was originally fixed or growing out of the soil or not⁶.

It does not include shares⁷, stocks⁸, documents of title, or rights of action.

It does not include things fixed upon or built upon the land⁹.

¹ Illustration 1.

² Illustration 2.

³ Involved in *Watts v. Friend*, 10 B. & C. 446.

⁴ *Bailey v. Parker*, 2 B. & C. 37.

⁵ *Harman v. Reeve*, 18 C. B. 586; 25 L. J., C. P. 257.

⁶ Benj. 107, quoting Black. 9-10.

⁷ *Duncroft v. Albrecht*, 12 Sim. 189 (Railway Shares); *Humble v. Mitchell*, 11 A. & E. 205 (Joint Stock Bank Shares).

⁸ *Heseltine v. Siggers*, 1 Ex. 856; 18 L. J., Exch. 166.

⁹ *Lee v. Gaskell*, 1 Q. B. D. 700 Black. 20.

It does not include the natural growth of land, such as growing timber, fruit, or trees, and the like, growing in the land, and not severed from it¹, and from the further growth of which in the soil the purchaser is to derive some benefit²; but it does include standing timber, which is to be severed immediately either by the seller or the buyer³.

It [probably] includes crops annually produced by human labour, such as corn and potatoes, or crops which require annual labour in order to make them grow from old roots, such as hops, growing in the land but not severed from it.⁴

It [probably] does not include crops produced by human labour which require a longer period than a year to come to maturity⁵, or which produce more crops than one when they have come to maturity, such as madder, clover and teasels, growing in the land and not severed from it⁶.

ARTICLE 4.

Acceptance and Actual Receipt.

An agreement for the sale of goods of the value of 10*l.* or upwards is a contract enforceable by law, if the buyer—

- (a) actually receives; and
- (b) accepts part of the goods sold.

¹ Benj. 109. Such crops are sometimes called 'fructus naturales.' These, however, are included under s. 4 of the statute which relates to the sale of real property.

² *Marshall v. Green*, 1 C. P. D. 35; 1 Wms. Saunders, 395.

³ See *Marshall v. Green*.

⁴ *Graves v. Weld*, 5 B. & Ad. 105, 119; but see *Waddington v. Bristow*, 2 B. & P. 452, which, however, is virtually overruled. See Benj. 102; see also *Evans v. Roberts*, 5 B. & C. 829, and *Marshall v. Green*. Such crops are sometimes called 'fructus industriales.'

⁵ Co. Litt. 55 *a*, adopted in *Graves v. Weld* (sup.). Such crops would, however, come under the 4th section, if they do not come under the 17th.

⁶ *Graves v. Weld*, 5 B. & Ad. 105, 119, Benj. 118. The case does not quite support the proposition in the text.

⁷ These are very nearly the words of the Statute of Frauds.

ARTICLE 5.

What constitutes Actual Receipt.

A buyer is said actually to receive goods from the seller—

(a) When the seller or his agent actually delivers the goods to the buyer or his agent, or authorises the buyer or his agent to assume the control of the goods, wherever they may be.¹

(b) When the seller continues to hold the goods after the sale, agreeing with the buyer to hold them as a bailment from the buyer².

(c) When, the goods being at the time of the sale in the possession of any person as agent or bailee for the seller, it is agreed between the buyer and the seller and such agent or bailee that such agent or bailee shall from the time of the agreement hold the goods for the buyer and not for the seller³.

(d) If at the time of the sale the buyer himself holds the goods as agent or bailee for the seller, an agreement that the buyer shall from the time of such agreement hold the goods as owner may be inferred as a fact from any dealings by the buyer with the goods inconsistent with the continuance of his relation of agent or bailee to the seller⁴.

In each of the cases aforesaid, the question whether there has been an actual receipt of the goods by the buyer is a question of fact. The question whether facts have been proved from which such a receipt may be inferred is a question of law⁵.

If the buyer directs the seller to send the goods to the buyer by any common carrier or other person, such carrier or other person is deemed to be the agent of the buyer for the receipt of the goods.

A wrongful refusal to accept goods lawfully tendered to, the buyer has not the same effect as an actual receipt of the goods.

¹ Benj. 154-5.

² Illustrations 1-4.

³ Illustrations 5-6.

⁴ Illustration 7. ⁵ Benj. 150 sqq.; *Bushel v. Wheeler*, 15 Q. B. 443 n.

ILLUSTRATIONS.

1. B, a livery stable keeper, offers to sell a horse in his stable to A. A says: 'The horse is mine; but, as I have no stable, you must keep him at livery for me.' B is bailee for A, and this is a receipt and acceptance by A¹.

2. B verbally agrees with A to sell A a horse. Immediately after the agreement is complete, B asks A to lend B the horse for a short time. A assents, and leaves the horse in B's custody. This amounts to a receipt and acceptance by A².

3. A agrees to buy a horse from B for forty-five guineas, and to fetch it away on a day named. A comes back about that day, rides the horse, and asks B, as a favour, to keep it for him another week, saying that he will call and pay for it at the end of that time. Here there is no actual receipt or acceptance by A³.

4. A verbally orders two puncheons of rum and one of brandy from B, on the terms of six months' credit, the brandy to remain in B's bonded warehouse till wanted by A. B accepts the order, and sends A an invoice specifying particular puncheons as sold to A, stating the price, and adding 'free for six months,' meaning that the goods may remain so long without charge in B's warehouse. After the six months, A asks B if he will take the goods back, or sell them for A. These facts are relevant to show that A has actually received and accepted the brandy by assenting to B's holding it as warehouseman⁴.

5. A buys of B, through a broker, five tons of a specified quality of oil, to be paid for on delivery. B has oil of that quality lying at a wharf, and authorizes the wharfinger to transfer the quantity bought by A into A's name. The wharfinger gives B a transfer order. B then sends a clerk to A with the transfer order, and an invoice and receipt, to

¹ *Elmore v. Stone*, 1 Taunt. 458.

² *Marvin v. Wallis*, 6 E. & B. 726; 25 L. J., Q. B. 369.

³ *Tempest v. Fitzgerald*, 3 B. & Ald. 680.

⁴ *Castle v. Swooner*, in Ex. Ch. 6 H. & N. 828; 30 L. J., Exch. 310.

be exchanged for a cheque. A takes the transfer order and refuses to give a cheque. B's clerk then goes to the wharfinger and withdraws B's authority, but the wharfinger delivers to A. Here there is no actual receipt by A, because the wharfinger delivered against B's will, and never held for A with the consent of both A and B¹.

6. B verbally sells to A goods lying at a wharf, and endorses and delivers to A a delivery account for them. A keeps the warrant, but refuses to pay for the goods, and denies that he ordered them. These facts do not amount to a receipt of the goods by A, though they are relevant to show an acceptance under the next following article².

7. A has goods of B's in his custody. It is agreed that A shall sell part of the goods, to satisfy a debt exceeding 10*l*. which B owes A; but before any sale has been made A verbally proposes to keep the goods at a price mentioned, and B assents. This is relevant to show a change in the character of A's custody of the goods amounting to a receipt and acceptance by him as buyer³.

(To be continued.)

¹ *Godts v. Rose*, 17 C. B. 229; 25 L. J., C. P. 61.

² *Farina v. Home*, 16 M. & W. 119; 16 L. J., Exch. 73.

³ *Edan v. Dufield*, 1 Q. B. 302.

EDITOR'S NOTES.

Electing Judges by Popular Vote.

An argument against the election of judges is supplied by the recent defeat of Mr. Justice Cooley in the State of Michigan. Of him *The Central Law Journal* says: "Thos. M. Cooley as a constitutional lawyer takes rank by the side of Story and Marshall. As a writer upon constitutional law he is superior to Story, because he is more accurate, less diffuse, and is not vain of a display of learning. His legal judgments surpass those of Story in brevity and diction; they equal those of Marshall in diction and in massive reasoning, and greatly surpass them in learning. No judge has ever lived in this country, possessing a more enlightened spirit of justice, or a more evenly balanced judicial mind. His work on torts is the finest epitome of the law upon that subject which has ever been written in the English language. His labors as a lecturer in the law school of the University of Michigan have given him a personal acquaintance with the members of the bar in every section of the Union. Through his labors as an instructor, an author and a judge, he has acquired a hold upon the good opinions of his professional brethren such as is probably enjoyed by no other living lawyer. And yet this great lawyer, after having occupied for some twenty continuous years a seat upon the supreme bench of his State, was defeated of re-election the other day by a political combination, having at the head of their ticket a man unknown to the legal profession outside of Michigan."

Every system has its defects. The fact that Judge Cooley has been maintained for twenty years, by popular vote, as a judge, shows, at all events, that that system does not necessarily result in the election of demagogues—a result that we, in Canada, are apt to regard as inevitable. To the appointment-for-life principle there is the grave ob-

jection that although a judge may disappoint expectations, or survive his usefulness, his death is the only release from his encumbrance of the bench, and a frightful waste of time and money.

English Registrars and Manitoba Judges.

In *The Law Journal* (Eng.) of 11th April we find the following:—"We regret to announce the death of Mr. Frederick S. Teesdale, fourth registrar of the Chancery Division, which took place on Wednesday, the 8th instant. He will be succeeded in his office, *which is worth £1,800 a year*, by Mr. Nelson Ward." *Quære*, If the fourth registrar gets \$9,000 a year, how much is the salary of the first registrar in excess of that of a Manitoba judge?

Strabismic Advantages.

The Supreme Court of Pennsylvania has decided that unless persons look both ways in crossing a railroad track they cannot obtain damages for injuries they may receive. This gives cross-eyed people a decided advantage over those who can see straight, and in some measure mitigates the affliction of being cross-eyed. Life is full of compensations. —*Boston Courier*.

The Pennsylvania court is not alone in its opinion. See *Davey v. L. & S. W. Ry. Co*, 12 Q.B. Div. 70.

Kansas Law Journal.

We have refrained from noticing this new journal until a series of its issues—not merely the first issue—should determine its value. The last number leaves us no room for doubt that the *Kansas Law Journal* will be a permanent and valuable addition to the legal literature of the continent.

Easter Term.

By an Act of the Session just closed, Easter Term commences on the third Monday in May.

THE MANITOBA LAW JOURNAL.

VOL. II.

JUNE, 1885.

No. 6.

EQUITABLE ASSIGNMENTS.

TWO points connected with this subject have lately received further elucidation in the reports. We will notice them shortly.—

SPECIFICATION OF FUND. An equitable assignment is an *assignment* that will be enforced in equity. It must therefore contain some description of the fund or debt which is the subject of the assignment. A cheque upon a banker or a bill of exchange upon a debtor is not an assignment at all. *Schroder v. Central Bank of London*, 24 W. R. 710; *Thompson v. Simpson*, L. R. 9 Eq. 497, L. R. 5 Ch. App. 659; *Shand v. Du Buisson*, L. R. 18 Eq. 283; *Hopkinson v. Forster*, L. R. 19 Eq. 74; *Caldwell v. Merchants Bank*, 26 U. C. C. P. 294; *Percival v. Dunn*, 20 L. J. Notes of Cases 35. It is sufficient, however, if the fund be indicated, although not fully described. For example, if A be engaged in doing work for B, and the latter give to C an order upon A for the payment of £100 "out of moneys due, or to become due, from you to me," the fund is sufficiently certain. *Brice v. Bannister*, 3 Q. B. D. 569; *Farquhar v. City of Toronto*, 12 Gr. 186; *Diplock v. Hammond*, 5 De G. M. & G. 320; *Lambe v. Orton*, 1 Dr. & Sm. 125; *Chowne v. Baylis*, 31 Beav. 351; but see *Re Farrell*, 10 Ir. Ch. R. 304. This doctrine is analogous to that recently treated of (see *Prophetic Conveyances*, 2 Man.

L. J. 24), where it was shown that a conveyance of goods not *in esse* will be enforced in equity, provided that the goods are sufficiently described for identification.

When we said that the assignment must *contain* a sufficient description of the fund, we did not mean to be understood as implying that the assignment must be in writing (*Gurnell v. Gardner*, 9 *Jur. N. S.* 1220; *Tibbits v. Genge*, 5 *Ad. & E.*, and *McMaster v. Canada Paper Co.*, 1 *Man. L. R.* 309, are clear authorities to the contrary); nor that a valid assignment may not be partly in writing and partly verbal. A bill of exchange, as we have said, is not an assignment of anything, and yet if it be discounted upon the faith that the drawer will accept it and pay it out of a particular fund, then there is in equity a good assignment of the fund. *Re Thornton* 13 *L. T. N. S.* 568; *Lamb v. Sutherland*, 37 *U. C. Q. B.* 143; *McLean v. Shields*, 1 *Man. L. R.* 278.

WHAT MAY BE ASSIGNED. Can there be a good assignment of moneys to be earned? In *Lamb v. Sutherland*, 37 *U. C. Q. B.*, Wilson, J., says: "To constitute an equitable assignment of money in the hands of a third person, it is necessary there must be a particular *existing* fund which is dealt with, and there must be a specific appropriation of the whole or of some part of that fund. *Re Farrell* 10 *Ir. Ch. R.* 304; *Re Thornton*, 13 *L. T. N. S.* 568; *Watson v. The Duke of Wellington*, 1 *Russ. & M.* 602." There may be, however, a good equitable assignment of non-existing goods (see *Prophetic Conveyances*, 2 *Man. L. J.* 24), that is, there may be a promise to assign them when they come into existence, which equity will enforce; and why may not a promise to assign money when earned be also enforced?

The facts in *Ex parte Nichols*, *In Re Jones*, 22 *Ch. Div.* 782, were as follows: The debtors carried on the business of the Alexandra Palace, and they made an arrangement with a railway company that the fees paid by the public for conveyance to the Palace and admission into it should

be received in one gross sum by the company, and that this sum should be divided in certain specified proportions between the debtors and the company. During the currency of this agreement the debtors assigned to Y. & Co. "all and every the sums and sum of money now due and owing, and hereafter to become due and owing, from the railway company to" Subsequently the debtors became bankrupt. The assignee in bankruptcy carried on the Palace business and claimed as against Y. & Co. to receive the debtor's share of the railway receipts accruing after the bankruptcy. And his claim was held to be well founded.

There is nothing in this case to show that the assignment would not have been valid during the lifetime of the debtors, provided they had not become bankrupt; and the head note would seem to imply that a trader may make a good equitable assignment of all the receipts of his business except as against an assignee in bankruptcy.

Nice questions arise under building contracts where payments are to be made during the progress of the work.

From *Tooth v. Hallett, L. R., 4 Ch. App. 242*, we may gather, (1) that there may be a good equitable assignment of moneys to become due under such a contract; (2) that if the owner properly discharges the contractor before the completion of the work, and before any money is payable to him, and in finishing the building expends all that would have become due to the contractor, the assignee has no claim against the owner; and (3) that if a trustee for the contractor's creditors completed the building and expended thereon a sum equal to that payable under the contract, his claim to the money would be preferred to that of the equitable assignee.

From *Ex parte Moss, In Re Toward, 14 Q. B. Div. 310*, we may learn, (1) that the application of *Ex parte Nicholls (ante)* must be very carefully watched; for if a contractor under a building contract becomes bankrupt after he has received payment of all the instalments due to him, and

the assignee in bankruptcy completes the building, expending *less* than the amount remaining due under the contract, the equitable assignee may be entitled to enforce his assignment as against the excess. (2) It is said that if a margin be created by withholding from the contractor a percentage of the value of the work "it could not be questioned that a valid charge might be made upon that margin as a subject of property." This we should fancy might possibly be questioned—we speak with all deference. For example, if very shortly after the commencement of the work an assignment of the drawback were made, and before it could fairly be said that any appreciable part of it had been earned the contractor became bankrupt, would the assignee be entitled as against the trustee in bankruptcy in case the latter spent more in completing the building than the whole contract price? We should think not. And if we are right the question must always be, What portion of the money payable after bankruptcy was earned before that time? To that extent the equitable assignee is entitled.

Dum Fervet Opus.

There is room upon the Court House walls for the portrait of another Chief Justice. The series now commenced should be maintained. And the Ontario practice of securing a representation while the judge is in full work obviates any embarrassment arising from delay.

Idem Sonans.

Evidence as to a person's identity, based upon the sound of his voice, is competent. *Commonwealth v. Hoyes*, S. J. C. Mass., Nov, 1884; 19 Rep. 306.

THE 17TH SEC. OF THE STATUTE OF FRAUDS.

(Continued from page 70.)

ARTICLE 6.

Acceptance defined.

Acceptance of part of the goods sold means an assent by the buyer to a proposal by the seller that certain goods shall be part of the goods sold, whether such assent is or is not subject to a right on the part of the buyer to object to the bulk of the goods as not corresponding to the terms of the agreement¹.

Acceptance may either precede, or accompany, or follow the actual receipt of the goods, and may be inferred as a fact from any of the circumstances mentioned in the Clauses i, ii, or iii, next following :—

(i) Where goods are marked or set apart for the buyer with his consent before his actual receipt of them, or where he inspects and approves them before his actual receipt of them².

(ii) Where the buyer acts with reference to the goods, or to documents of title representing them, before or after their actual receipt in a manner in which the owner only would be entitled to act in relation to them³.

(iii) Where the buyer omits to reject goods actually received by him for an unreasonable time after he has had an opportunity of exercising the option (if he has an option) of rejecting them.

If the buyer directs the seller to send the goods to the buyer by any common carrier or other person, such common carrier or other person is not deemed to be the agent of the buyer for the purpose of accepting the goods.

¹ Blackburn, 23.² Illustrations 1, 2.³ Illustrations 3-9.

A tender of the goods for acceptance, and a wrongful refusal to accept on the part of the buyer, is not, for the purposes of this article, deemed to be equivalent to acceptance of them.

ILLUSTRATIONS.

1. B offers to sell to A 156 firkins of butter lying in B's cellar at Liverpool. A opens and inspects some of them, and verbally agrees with B to buy the whole at the price of 424/., and gives directions for the delivery of them in London at C's warehouse, where they are delivered accordingly. The approval of the butter is an acceptance, and the delivery at C's warehouse a receipt by A¹.

2. A verbally agrees with B to buy of him twelve bushels of tares at 1/, a bushel, to remain on B's land till seed-time. B measures out twelve bushels and sets them aside for A. Here there is no acceptance, as A does not assent to the appropriation by B².

3. A agrees with B to take a stack of hay standing in B's yard at 2s. 6d. per cwt. Two months afterwards C agrees with A to buy some of it. The re-sale is relevant to show a receipt and acceptance by A³.

4. A agrees with B, a coachmaker, to buy of him a certain carriage, and directs certain alterations to be made in it. A sees and approves the alterations when made, and requests that the carriage may be left in B's shop till he is ready to take it away, and that, in the meantime, B will provide a horse and a man to use the carriage a few times, so that on exportation it may be a second-hand carriage. These facts are acts of ownership amounting to an acceptance of the carriage⁴.

¹ *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J., Q. B. 261.

² *Howe v. Palmer*, 3 B. & Ald. 321.

³ *Chaplin v. Rogers*, 1 East, 192.

⁴ *Bedumont v. Brengeri*, 5 C. B. 301. The action in this case was for a refusal to accept, and the judge directed a verdict for the plaintiff. A new trial was moved for on the ground that there was no evidence of acceptance, and the court refused it, saying that the evidence was ample. If requested at the trial, the judge would no doubt have left the case to the jury.

5. A verbally agrees to sell B turnip-seed, then growing, to be harvested and threshed by A, and delivered to B as B shall direct. A having harvested and threshed the seed sends twenty sacks of it to B. B spreads it out to a greater extent than is actually necessary to examine its condition, and then rejects it on the ground that it is in bad condition. A proves facts tending to show that it was in fact in good condition when despatched. Here it is a question of fact whether B's dealing with the seed was an act of ownership amounting to acceptance¹.

6. A verbally orders of B three hogsheads of glue of a specified quality. B sends two hogsheads to A, which A unpacks in his own warehouse and puts into bags. A, on examination, says it is inferior to the specified quality, and rejects it. Unpacking glue alters its condition, and prevents it from being repacked. A's act is relevant to the question whether he accepted the glue or not.

7. A agrees verbally with B to buy fifty quarters of wheat, each of a specified weight, and according to a sample then produced by B. The wheat is by A's order delivered to a general carrier, and is by him in due course delivered to A, who has, in the meanwhile, resold the wheat to C by the same sample by which B sold it to A. A, without examining the bulk himself, tenders it to C, who finds the wheat under the specified weight and rejects it. A thereupon gives notice to B that C rejects it as under weight. The delivery to the carrier is a receipt by A, and the re-sale an acceptance by A, although A is still entitled to object that the wheat does not correspond to the contract².

8. B agrees verbally with A to sell to A a quantity of barley for 80*l.* to correspond with a sample. B sends the bulk to a railway station consigned to A's order. A does nothing, and, two days after the wheat reaches the station, becomes bankrupt. B gives notice to the station-master not

¹ *Parker v. Wallis*, 5 E. & B. 21.

² *Morton v. Tibbett*, 15 Q. B. 428; 19 L. J., Q. B. 382.

to deliver the barley to A or to any one except B or his order. Here there is a receipt (it seems), but no acceptance¹.

9. A orders of B a quantity of stores for a ship of A's, to be delivered at Constantinople. By A's request the bill of lading of the stores is made out in B's name deliverable to C at Constantinople. B pays the freight, receives the bill of lading, and hands it over to A, who then repays B the freight. A keeps the bill of lading for thirteen months, and sends it back to B on hearing that the goods have not been delivered at Constantinople. The jury were justified in finding on these facts that A both received and accepted the stores².

ARTICLE 7.

Acceptance of Samples, or of part of Goods, not completely in Existence.

For the purposes of the acceptance and receipt, samples are taken to be part of the goods sold if they constitute, and are delivered as, part of the bulk, but not otherwise³.

If there is an agreement for the sale of goods, part of which are, and part of which are not, in existence at the time of the agreement, every part of them is deemed to be part of the goods to which the agreement applies, for the purposes of receipt and acceptance .

¹ *Smith v. Hudson*, 6 B. & S. 431; 34 L. J., Q. B. 145.

² *Currie v. Anderson*, 2 E. & E. 592; 29 L. J., Q. B. 87. Compare *Meredith v. Meigh*, 2 E. & B. 364; 22 L. J., Q. B. 401, where there was delivery of a bill of lading to carriers who were agents to receive, but not to accept. The case contains *dicta* to the effect that dealings with documents of title may be equivalent to acceptance.

³ *Benj.* 128; *Hinde v. Whitehouse*, 7 East, 558; *Gardner v. Grout*, 2 C. B., N. S. 340.

⁴ *Scott v. E. C. Railway*, 12 M & W. 33; 13 L. J., Exch. 14.

ARTICLE 8.

Earnest.

An agreement for the sale of goods of the value of 10*l.* or upwards is a contract enforceable by law, if anything is given by the buyer to the seller by way of earnest¹.

Earnest is money, or a valuable thing, not forming part of the price of the goods sold, and given by the buyer to the seller, and accepted by the seller, in order to mark the assent of both parties to the agreement.

ARTICLE 9.

Part Payment.

An agreement for the sale of goods of the value of 10*l.* or upwards is a contract enforceable by law, if the buyer gives something to the seller by way of part payment².

If it is one of the terms of an agreement for the sale of goods that the seller shall deduct from the price of the goods anything due from him to the buyer, such deduction is not a part payment of the price; but if, subsequently to the agreement for the sale of the goods, or by an independent agreement made at the same time therewith, the parties agree that any claim of the buyer upon the seller shall be set off against part of the price of the goods, such an agreement is part payment³.

¹ Substantially the words of the statute. See Benj, 162 for the definition of "earnest."

² Stat. Frauds.

³ *Walker v. Nussey*, 16 M. & W. 302: 16 L. J., Exch. 120.

ARTICLE 10.

Signed Contracts.

An agreement¹ for the sale of goods of the value of 10l. or upwards is a contract enforceable by law if it is in writing, signed by the parties to be charged by such contract, or by their agents thereunto lawfully authorized.

When such a contract has been made, no other evidence of its terms can be given than the writing itself, or secondary evidence of the contents of the writing in the cases in which secondary evidence is admissible.

Subsequent notes or memoranda relating to any such contract are irrelevant and ineffectual, except as evidence that the parties to the original contract rescinded it and made a new one in the terms of such notes or memoranda³.

¹ This and the next Article differ widely from the words of the statute, which are: "No contract, &c., shall be allowed to be good, except . . . that some note or memorandum in writing of the bargain be made and signed by the parties to be charged," &c. We believe, however, that the articles as drawn by us represent the meaning of the statute as ascertained both by numerous authorities and conclusive arguments. It would be absurd to suppose that the statute meant to say that a contract completely put into writing should be void, but that a verbal contract, of which a note or memorandum was afterwards made, should be good. This, however, is its literal meaning; for it says that no such contract shall be allowed to be good except in certain cases, and it does not specify the case of contracts completely reduced to writing, but only the case of a verbal contract of which some written "note or memorandum" is made. This elliptical form of expression is one of the causes which have thrown so much confusion over the cases relating to brokers' books and bought and sold notes. The way in which the matter is stated in the two Articles in the text is meant to remove the obscurity. It is pointed out by Erle J. and Patteson J. in *Sievwright v. Archibald*, 17 Q. B. 103; 20 L. J., Q. B. 529. See too *Saunderson v. Jackson*, 2 B. & P. 238. See too the American case of *Coddington v. Goddard*, 1 Langdell's Cases on Sales, 614.

² This is the general rule of the common law. See Stephen's Digest of the Law of Evidence, art. 90.

³ *Hawes v. Forster*, 1 Moo. & R. 368, as explained in *Thornton v. Charles*, 9 M. & W. 802, and by *Sievwright v. Archibald*, 17 Q. B. 103; 20 L. J., Q. B. 529.

Such a contract may be made by a broker on behalf of the buyer and seller of such goods, if he is duly authorized thereto by each; and if the broker, having made such a contract, enters it in his book and signs it as the agent and by the authority of each party, such entry is such a contract as aforesaid¹.

Provided that if the broker afterwards sends out, and the parties accept, signed bought and sold notes corresponding with each other, but differing from the contract as entered in the broker's book, such bought and sold notes are facts relevant to show that the parties entered into a new contract in the terms of those notes².

Provided also that a custom that the seller shall have a reasonable time, after the receipt of the sold note, to object to the sufficiency of the buyer, is reasonable³.

ARTICLE II.

Note or Memorandum.

An agreement for the sale of goods of the value of 10*l.* or upwards is a contract enforceable by law (although it was made verbally) if a note or memorandum in writing containing the particulars specified in Article 12 is signed in the manner described in Article 10⁴.

Such note or memorandum may be contained in more documents than one, provided that, if any such document is not signed as hereinafter mentioned, it must be referred to by a document which is so signed in such a manner that the contents of the one are embodied by reference in the other⁵.

¹ *Sievwright v. Archibald*, 17 Q. B. 115, where all the authorities are examined, and several adverse dicta explained or overruled. Erle J. dissented

² Same authorities as in last note. ³ *Hodgson v. Davies*, 2 Camp. 533.

⁴ Statute of Frauds. (As to the parenthesis, see note to last article.)

⁵ *Saunderson v. Jackson*, 2 B. & P. 238; *Allen v. Bennet*, 3 Taunt. 169; *Jackson v. Lowe*, 1 Bingham, 9; *Hinde v. Whitehouse*, 7 East, 558; and see *Boydell v. Drummond*, 11 East 142, decided on s. 4.

The words 'document' includes documents consisting, at the time of signing, of several pieces of paper or other material, tied or otherwise fastened together¹.

The note or memorandum need not pass between the parties, though it may do so; but it may also be—

(i) A communication made by the party to be charged to a stranger to the contract²; or

(ii) A written offer made by the party to be charged to the party seeking to charge him, and verbally accepted by the party last mentioned³; or

(iii) A communication made by the party to be charged to the party who charges him, in which the party to be charged denies his liability on the contract⁴.

ILLUSTRATIONS.

1. A buyer at an auction signs his name in the catalogue opposite the lots bought by him. The sale is subject to conditions which are not contained or mentioned in the catalogue, nor annexed thereto. Here there is no note or memorandum sufficient for the purposes of this article⁵.

2. On January 11 B agrees to sell wool of greater value than 10*l.* to A. A hands to B a written memorandum of the terms of the sale, containing, among other things, the following: 'The whole to be cleared in about twenty-one days.' On February 8 B writes to A: 'It is now twenty-eight days since you and I had a deal for my wool, which was for you to have taken all away in twenty-one days from the time you bought it. I do not consider it business to put off like this; therefore I consider the deal off, as you

¹ Benj. 160.

² Benj. 167; *Gibson v. Holland*, L. R. 1 C. P. 1; 35 L. J., C. P. 5. In this case the communication was to the agent of the parties to be charged.

³ *Kemp v. Pickstey* (Ex. Ch.), 1 Ex. 342 (on s. 4).

⁴ Benj. 186.

⁵ *Hinde v. Whitehouse*, 7 East, 558. The auctioneer signed in this case, as to which see Article 13. *Pierce v. Corf*, L. R. 9 Q. B. 210.

have not completed your part of the contract.' Next day B orally repeats to A his refusal to deliver the wool. A asks for a copy of the contract, and B writes to A, enclosing a copy of the memorandum written by A: 'I beg to enclose a copy of your letter of January 11.' A's two letters, and the memorandum referred to in the second, form together a sufficient note or memorandum for the purposes of this Article¹.

3. B orally agrees to sell certain chimney-glasses to A, and sends them to him. On their arrival A finds them to be damaged, refuses to receive them, and some time afterwards writes to B: 'The only parcel of goods selected for ready money was the chimney-glasses, amounting to 38*l.* 10*s.* 6*d.*, which goods I have never received, and have long since declined to have, for reasons made known to you at the time.' This is a sufficient note or memorandum of the bargain².

4. A orders of B, by word of mouth, cheeses and candles of more than 10*l.* value. B sends to A the quantity ordered, and an invoice in the usual form. A refuses to take the goods, and sends back the invoice to B, with a signed note written on the back of it: 'The cheeses came to-day, but I did not take them in, for they were very badly crushed; so the candles and cheese are returned.' The invoice, with this note endorsed upon it, is a sufficient note or memorandum³.

5. B orally agrees with A to sell him some timber. In answer to a letter from B's solicitor, claiming payment as on an unconditional sale, A writes: 'I have this moment received a letter from you respecting B's timber, which I bought of him at 4*s.* 6*d.* per foot, to be sound and good,

¹ *Buxton v. Rust*. L. R. 7 Ex. 1. In Ex. Ch. *ib.* 279. N. B. In this case the parties differ as to the construction of the contract, though they agree as to the terms.

² *Bailey v. Sweeting*, 9 C. B., N. S. 843; 30 L. J., C. P. 150.

³ *Wilkinson v. Evans*, L. R. 1 C. P. 407; 35 L. J., C. P. 224.

which I have some doubts whether it is or not, but he promised to make it so and now denies it.' This is not a sufficient note or memorandum, as it does not admit the agreement under which B claims payment, but sets up a different agreement not admitted by B¹.

ARTICLE 12.

What the Note or Memorandum must contain.

The note or memorandum referred to in Article 11 must show—

(i) Who are the parties to the agreement, either by naming them, or by giving a description of them by which they can be identified as such; and

(ii) What was the promise made by the party to be charged; but it is not certain how far the promise made by the party seeking to charge the other need appear.

The price at which the goods were sold must appear if it was agreed upon by the parties, but it need not be stated if it was not specifically agreed upon.

ILLUSTRATIONS.

1. A writes, signs, and delivers to B a document in the following words: 'I will furnish B with funds for the purchase of a steam engine and machinery for a flour-mill on his suiting himself with the same and notifying the purchase to me.' B gives this document to C, who, on the faith of it, supplies a steam engine to B. The document is not sufficient as a note or memorandum for the purposes of Article 11, inasmuch as it fails to show who were the parties to the agreement².

2. B having bought goods exceeding 10*l.* in value resells them to A, who signs a document in the following words: 'A agrees to buy the whole of the lots of marble purchased

¹ *Smith v. Surman*, 9 B. & C. 561.

² *Williams v. Byrnes*, 1 Moo. P. C. C. N. S. 154.

by A, now lying at Lyme Cobb, at 1s. per foot.' This is not a sufficient note or memorandum, as it does not show that B is the seller¹.

It would be sufficient if it appeared, either by the document itself or by external proof, that B was a dealer in marble².

3. A signed memorandum in these words—'We agree to give A 19*d*. per pound for thirty bales of Smyrna cotton'—is, as against the party signing, a sufficient note or memorandum in writing for the purposes of this Article, though it shows no promise on A's part to sell the cotton³.

4. A orders goods at B's shop. A list of the goods bought is entered in a book entitled 'Order Book' and having B's name on the fly-leaf. A writes name and address at the foot of the list. The list signed by A in B's order book is a sufficient note or memorandum as against A, as it shows all that it is to be done on A's part, although a slight alteration to be made by B in one of the articles is not mentioned in the list⁴.

5. A delivers to B an order in writing to build a carriage of a specified description by a certain time, saying nothing about price. B makes the carriage, and in the course of the making alters it in various points at A's request. The order is a sufficient note and memorandum, and A must take the carriage at a reasonable price⁵.

(To be continued.)

¹ *Vandenbergh v. Spooner*, L. R. 1 Ex. 316; 35 L. J., Exch. 201 (doubted by Willes J.); L. R. 3 C. P. p. 54.

² *Newell v. Radford*, L. R. 3 C. P. 52; 37 L. J., C. P. 1.

³ *Egerton v. Matthews*, 6 East, 307.

⁴ *Sarl v. Bourdillon*, 1 C. B., N. S. 188; 26 L. J., C. P. 78.

⁵ *Hoadley v. Maclaine*, 10 Bing. 482.

EDITORIAL NOTES.

Queen's Counsel.

The Law Journal (Eng.) joins us in advocating the abolition of Queen's Counsel. It says: "It is fully within the competence of the bar, by arrangement among themselves, to provide under what circumstances any member shall be allowed to advance himself to a position in which he shall be entitled to lead his seniors in point of standing. It is an example of the want of independence of the bar that the question of precedence should have been left to the crown to decide instead of being retained under the control of the bar itself. The Lord Chancellor would probably be glad to be relieved of a troublesome and disagreeable duty, and if the bar were to lay down for itself the circumstances in which any of its members may anticipate his seniority, there is no doubt the courts would fully recognize the arrangement. No regret would be felt at the abolition of the anomalous dignity of Queen's Counsel, which is a comparatively modern institution, originating not in any consideration of merit or convenience, but purely in court favor; and the opportunity might be taken of reviving, in a new form, the ancient order of serjeants, if the crown should be graciously pleased to place that title at the disposal of the bar."

The Statutes.

Everyone is presumed to know the law, therefore there is no use in printing the statutes. This may be unanswerable as a deduction of pure reason from an indisputable premise; and it is not the part of an editor to plead ignorance. Nobody requires the statutes, we therefore admit, but the symmetrical appearance of the library depends upon its possession of another volume of statutes, and its appearance (that of the library, not the statutes) is important.

THE
MANITOBA LAW JOURNAL.

VOL. II. •

JULY, 1885.

No. 7.

The Golden Rule.

SIC UTERE TUO UT ALIENUM NON LÆDAS.

- I. "So use your own property as not to injure the rights of another." See Arg. *Jefferies v. Williams*, 5 Ex. 797.
- II. "If a man brings, or uses, a thing of a dangerous nature on his own land, he must keep it at his own peril, and is liable for the consequences if it escapes and does injury to his neighbor." *Jones v. Festiniog Ry. Co.*, L. R. 3 Q. B. 736.

"Love your neighbor as yourself" is a trifle too vague and purely ethical for adoption as a legal maxim. "Do unto others as you would that they should do unto you," is more practical ; and if it could always be predicted of "you" that you only desire others to "do unto you" as the law requires they should, then the maxim merely means that you are to "do unto others" as the law provides, and is, if not objectionable as too axiomatic, a very good rule for your conduct in life.

The maxium *sic utere tuo ut alienum non lædas* may be called the golden rule of law—prescribing, as it does, your duty to your neighbor. The rule itself, as well as its limitations and applications are judge-made. No statute ever attempted to define the relative duties of riparian pro-

prietors or cess-pool owners. The law has been gradually erected by the decisions of the judges as to reasonable and unreasonable conduct, and the system of laws as it stands to-day is a splendid refutation of Bentham's jeremiad against judge-made law. We propose to note here some of the more usual and interesting applications of the rule. Their full ramifications are too extensive for our space.

WATER.—Distinguish between ; (1) water flowing in defined, visible, natural channels ; (2) water flowing in artificial channels ; and (3) subterranean water, not flowing in any ascertained channel.

(1.) *Water flowing in defined, visible, natural channels.* "The flow of a natural stream creates natural rights and liabilities between all the riparian proprietors along the whole of its course. Subject to reasonable use by himself, each proprietor is bound to allow the water to flow on without altering the quantity or quality. These natural rights and liabilities may be altered by grant or by use of an easement to alter the stream, as by diverting, or fouling, or penning back or the like." *Per Earle, C. J., Gaved v. Martyn* 19 C. B. N. S. at p. 759.

(2.) *Water flowing in artificial channels.*—"If an individual collects surface water dispersed on his land, which would naturally disappear by absorption or evaporation, and by means of a trench carries it off in a stream so as appreciably to injure his neighbors, he commits an unlawful act." *Northwood v. Township of Raleigh*, 3 Ont. R. 347, 358. But if the increase in the volume of the stream be inappreciable there is no liability. *Law v. Corporation of Niagara Falls*, 6 Ont. R. 467.

Right to continue or have continued an artificial flow of water.—"If the stream flows at its source by the operation of man, that is, if it is an artificial stream, the owner of the land at its source or the commencement of its flow, is not subject to any rights or liabilities towards any other person in respect to the water of that stream." *Gaved v. Martyn*, 19 C. B. N. S. p. 759. "If there is uninterrupted user of the land of the neighbor for receiving the flow as of right for twenty years,

such user is evidence that the land from which the water is sent into the neighbors land has become the dominant tenement, having a right to the easement of so sending the water, and that such neighbor's land has become subject to the easement of receiving the water. But such user of the easement of sending on the water of an artificial stream is of itself alone no evidence that the land from which the water is sent has become subject to the servitude of being bound to send on the water to the land of the neighbor below. The enjoyment of the easement is of itself no evidence that the party enjoying it has become subject to the servitude of being bound to exercise the easement for the benefit of the neighbor." *Ib.* 758.

(3.) *Subterranean water not flowing in any ascertained channel.* Although a flowing stream may not be diverted or diminished, the owner of the land from which it starts may, it would seem, in some cases cut off its source. There seems to be no danger in granting that the owner of land may intercept all the rain which would otherwise fall upon his land and appropriate it to his own use. And yet if this be granted, then it must follow that he has a right to control the rain water after it reaches the ground, and for that purpose to build huge tanks, even though the result may be, in the case of a large owner, to cut off the supply of a stream, and so put an end to the usefulness of mills along its banks. And, *quære*, could the mill owners, by prescription, claim the right to prevent the land owner catching the rain? If so, they could stop him building a town, for the inhabitants would certainly use up the rain water. Where A, a land owner and a millowner who had for above sixty years enjoyed the use of a stream which was chiefly supplied by percolating underground water, lost the use of the stream after an adjoining owner had dug, on his own ground, an extensive well for the purpose of supplying water to the inhabitants of the district, many of whom had no title as land owners to the use of the water," it was held that A, the mill owner, had no cause of action. *Chasemore v. Richards*, 7 H. L. C. 349.

COLLECTING SUBTERRANEAN WATER.—If a man dig a hole in his own ground and thereby collect a large quantity of water, is he bound, at his peril, to keep it from flowing on to his neighbor. The second rule above quoted seems to say so, but let us see. Supposing A. digs a hole in his land which he wants to keep dry, and B. digs a hole in his land and water precolates into it from the surrounding soil, is B. responsible if the water goes from one hole to the other? Would he be liable if he even helped it on its way by removing what he knew to be the only barrier to its flow? Let us suppose that the holes are mines, and that B. on the higher level is troubled with water, but A. on the lower level is free from it. In such case it has been held that B. can work his mine up to his boundary, although he knows that by so doing the water in his mine will fill up A's, provided he so acts for the purpose of obtaining his coal. *Smith v. Kenrick*, 7 C. B. 513; *Wilson v. Waddell*, 2 App. Ca. 95; *Crompton v. Lea*, L. R. 19, Eq. 115. And this may be justified; if A. had not dug his mine it would not have been filled, and he cannot affect B's right to mine his coal to his boundary by changing the character of his land. The reply to this is, that A. has as good a right to dig a hole as B., and that every owner of a hole must see that it breeds no damage to his neighbors. If B. had collected the water on the surface, as for a reservoir, and then allowed it to run over upon his neighbor's land, he would have been clearly liable. *Rylands v. Fletcher*, L. R. 3 H. L. 330. Or if having built a mound against his own wall the moisture collected in it dampened his neighbour's house he would have suffered in damages. *Broder v. Saillard*, 2 Ch. Div. 692. But having collected the water underground, the law relieves him from liability! He must not, however, rub it in, so to speak—or rather pump it in, upon A. It is hard enough on A. to let it go unassisted. *Baird v. Williamson*, 15 C. B. N. S. 375. Perhaps the distinction drawn by Lord Cairns in *Rylands v. Fletcher*, L. R. 3 H. L. 338-9, between the natural use of land, as mining, and the unnatural use, as a site for a reservoir, may supply the reason for the distinctions in the cases.

FOULING SUBTERRANEAN WATER.—It is well settled that A. may drain B's well by digging a deeper one. This seems a little unfair to B., but of course he may enter into a digging competition with A. and see who can stand it the longest. Is it open to him, however, to say to A: "Now, be reasonable, let us dig to equal depths. If you refuse and dig deeper, you may get my water but I will see to it that it will not be very sweet." Or without threat, or wrong intent, can he change his well into a privy, and so spoil A's water? If B. can injure A. as to the *quantity* of his water, (by digging deeper), is he restricted from interfering with its *quality*? In *Ballard v. Thompson*, 26 Ch. Div., Pearson, J., held that A. had no remedy for the fouling of his well. But the case is unsatisfactory. The learned judge agrees with *Womersly v. Church*, 17 L. T. N. S. 190, in which it was held that "no man is entitled to create on his own land a nuisance of such a nature as to foul the water of his neighbor's well, or to allow sewage to percolate from his land into his neighbor's well." But he distinguishes the case in hand by saying: "That was not a case of dealing with subterranean water." And he bases his decision upon the fact that the course of the water being invisible, the plaintiff takes his chances of what the water may be when it comes to him." The case, moreover, is dissented from in *Snow v. Whitehead*, 27 Ch. Div. 588. In this case the defendant allowed water to collect in his cellar, from which it percolated into the plaintiff's, and it was held that the defendant was liable in damages.

DAMPNESS FROM ARTIFICIAL MOUNDS.—A landowner is not liable for the natural flow of water from his land to that of his neighbor, but he has no right to hold sponges against his neighbor's wall, nor against his own wall if it is not thick enough to keep all the moisture on his own property. *Broder v. Saillard*, 2 Ch. Div. 692; *Hurdman v. N. E. Ry. Co.* 3 C. P. Div. 168.

NOISE.—"A man is entitled to the comfortable enjoyment of his dwelling-house. If his neighbor makes such a noise as to interfere with the ordinary use and enjoyment of his

dwelling-house, so as to cause serious annoyance and disturbance, the occupier of the dwelling-house is entitled to be protected from it. It is no answer to say that the defendant is only making a reasonable use of his own property, because there are many trades and many occupations which are not only reasonable, but necessary to be followed, and which still cannot be allowed to be followed in the proximity of dwelling-houses, so as to interfere with the comfort of their inhabitants. *Per Jessel, M. R. in Broder v. Saillard, 2 Ch. Div. p. 701*; and see *Ball v. Ray, L. R. 8 Ch. Ap. 467*.

"The sounds from a piano," (no distinction as to quality of instrument or performer) and a nursery "are noises we must reasonably expect, and must to a considerable extent put up with." *Per Mellish, L. J. in Ball v. Ray, L. R. 8 Ch. Ap. 471*. As to the amount of annoyance which will induce the Court to interfere, see *Grant v. Fynney, L. R. 8 Ch. Ap. 8*.

NOXIOUS FUMES.—There is a distinction between an action for a nuisance in respect of an act producing a material injury to property, and one brought in respect of an act producing personal discomfort. As to the latter, a person must, in the interest of the public generally, submit to the discomfort of the circumstances of the place, and the trades carried on around him. The fact, however, that the locality where a trade is carried on, is one generally employed for the purpose of that and similar trades, will not exempt the person carrying it on from liability to an action for damages, in respect of injury created by it to property in the neighborhood. The law does not regard trifling inconveniences. Everything must be looked at from a reasonable point of view, and therefore in an alleged injury to property, as from noxious vapors from a manufactory, the injury to be actionable must be such as visibly to diminish the value of the property. Locality and all other circumstances must be taken into consideration, and in places where great works have been and are carried on, parties must not stand on extreme rights. *St. Helen's Smelting Co., v. Tipping, 11 H. L. C. 641*.

(To be continued.)

THE 17TH SEC. OF THE STATUTE OF FRAUDS.

(Continued from page 95.)

ARTICLE 13.

Of signing the Note or Memorandum.

Either the name¹ or [perhaps] the initials, if they are intended as a signature, or the mark of the person to be charged², must be written, made, printed, or stamped by him or by his agent duly authorized thereto on the note or memorandum³, in such a position as to show that it was the intention of the signer that such signature should refer to every material part of the note or memorandum proceeding from him⁴.

If the signature is not in the usual place, it is a question of fact whether it was or was not intended to have such reference as aforesaid⁵.

A signature, actually made before the whole or any part of the note or memorandum, may be adopted by the party signing as his signature intended to have reference to the whole of the note or memorandum in its final condition⁶.

Signature by an agent in his own name, whether with or without any statement or qualification showing that he is an agent, is equivalent, for the purposes of this Article, to a signature of the principal's name⁷.

It is immaterial whether the signature is made for the purpose of acknowledging, affecting, or verifying the agreement, or for any collateral purpose⁸.

¹ Benj. 190.

² Benj. 220. *Quere* as to a mark made by a person capable of signing. See *Hubert v. Morvan*, 2 C. & P. 528. Quoted by Benj. *loc. cit.* Also *Baker v. Dening*, 8 Ad. & E. 94, which seems to show that such a mark is a signature if so intended.

³ Illustrations 2, 3, 4.

⁴ *Caton v. Caton*, L. R. 2 H. L. 127, 142; 36 L. J., Chanc. 886.

⁵ Per Lord Abinger in *Johnson v. Dodgson*, 2 M. & W. 653.

⁶ Illustrations 1 and 5.

⁷ Benj. 198.

⁸ Illustration 6.

ILLUSTRATIONS.

1. A orders cotton goods of B. B takes a paper on which is printed, 'Bought of B & Co. cotton yarn and piece goods,' and writes at the head of it A's name, and underneath a list of the goods bought and their prices. This is a sufficient note or memorandum as against B¹.

2. A calls on B to offer goods for sale. B gives A an order, enters the terms in B's own book, with the heading, 'Sold B,' and gets A to sign it. This is a sufficient note or memorandum as against B, the 'Sold B' being a sufficient signature².

3. C, agent for B, calls on A to offer goods for sale, and A gives an order. C, at A's request, enters the terms in A's book, and signs them with his own name. This is not a sufficient note or memorandum as against A; as there is nothing to show that A made C his agent to write A's name³.

4. B is a hop-grower, A a hop-merchant, C a factor. By the custom of the hop trade, the factor acts for the seller only. After negotiation between A and C for the purchase of B's hops, B and A meet in C's counting-house, and agree for the sale of B's hops to A at 16*l.* 16*s.* a cwt. C then and there writes out and delivers to A a memorandum, as follows:—

Messrs. A.	Bought of C.
Bags 33.	B 16 <i>l.</i> 16 <i>s.</i>

The memorandum is dated, and the date is altered at A's request, in order to give him a longer time to pay, according to the custom of the trade. A takes away the memorandum. C retains a counterpart of it headed 'Sold to A.' These facts are relevant to show that C was authorized by B to make a binding record of the bargain between A and B; and if he was so authorized, there is a sufficient note or memorandum as against A⁴.

¹ *Schneider v. Norris*, 2 M. & S. 286; and see *Saunderson v. Jackson*, 2 B. & P. 238.

² *Johnson v. Dodgson*, 2 M. & W. 653.

³ *Graham v. Musson*, 5 Bing. N.C. 603; cf. *Murphy v. Boese*, L.R. 10 Ex. 126.

⁴ *Durrell v. Evans* (Ex. Ch.), 1 H. & C. 174; 31 L. J. Exch. 337.

5. B sends to A an unsigned memorandum containing the terms proposed by B for a sale of B's ship. A makes alterations in the memorandum, and then signs it, and returns it to B. B strikes out A's alterations, makes others of his own, signs the document, and takes it back to A. A then orally agrees to B's alterations, and approves of the memorandum as signed by B. A's signature now refers to the memorandum in its final condition, and there is, as against A, a sufficient note or memorandum of the agreement¹.

6. It is resolved at a meeting of directors of a company that an agreement be entered into in the terms of a draft then submitted to the board. The secretary enters a minute of the resolution in the minute book, and at the next meeting the minutes of the first meeting, including this entry, are signed by the chairman. The minutes so signed are a sufficient note and memorandum of the agreement as against the company².

ARTICLE 14.

Bought and Sold Notes.

If a sale of goods to the value of 10*l.* or upwards is made by a broker, and if the broker does not enter the contract of sale in his book, or enters but does not sign it, and if the broker afterwards sends a bought note to the buyer of the goods, and a sold note to the seller of the goods, the following consequences follow :—

If both notes are sent, and both are signed, and if the two correspond, they constitute a note or memorandum of the bargain within the meaning of the Statute of Frauds³.

If a bought note is sent to the buyer, signed by the broker, it is a sufficient note or memorandum to satisfy the Statute of Frauds as against the buyer⁴.

¹ *Stewart v. Eddowes*, L. R. 9 C. P. 311.

² *Jones v. Victoria Graving Dock Co.*, 2 Q. B. D. 314 (on s. 4.)

³ *Groom v. Aflalo*, 6 B. & C. 117, as explained in *Sievwright v. Archibald*, 17 Q. B. 103; 20 L. J., Q. B. 529.

⁴ *Parton v. Crofts*, 16 C. B., N. S. 11; 33 L. J., C. P. 189. *Cowie v. Remfry*, 5 Moo. P. C. C. 232, seems to be opposed to this. The case was strongly disapproved of by Willes, J. in *Heyworth v. Knight*, 17 C. B., N. S. 298.

If a sold note is sent to the seller, signed by the broker, and if the buyer authorized the broker to make the contract for him, and to send out bought and sold notes, the note is a sufficient note or memorandum to satisfy the Statute of Frauds as against the buyer¹.

If bought and sold notes are sent out, each signed by the broker, but varying from each other in a material point, and if the original contract was verbal, neither of the notes is a note or memorandum in writing within the meaning of the Statute of Frauds². The burden of proving such a variance lies on the defendant as soon as the plaintiff has produced a bought note or a sold note sufficient as against the defendant, according to the rules hereinbefore stated³.

JAMES FITZJAMES STEPHEN.
FREDERICK POLLOCK.

P. S.—My part of this paper was written some, I think upwards of seven, years ago. I have not revised or indeed seen it since, nor have I brought down the digest to the present day⁴. My judicial experience for the last six years has confirmed the opinions expressed in the paper. I may add that the Statute appears to me to have fallen practically into disuse. I have hardly ever been called upon to decide a case on the 17th Section. I am informed that in some large towns, in Liverpool for instance, mercantile men repudiate it in practice.

J. F. S.

November 25, 1884.

¹ *Thompson v. Gardiner*, 1 C. P. D. 777.

² *Siewewright v. Archibald*, 17 Q. B. 103; 20 L. J., Q. B. 529, and several earlier cases.

³ This Article and Article 13 differ in appearance from the eight propositions which Mr. Benjamin submits (255, 3rd ed.) as the result of the cases on the subject, but they will be found, on a careful comparison, to coincide substantially with them.

⁴ It was composed in 1877-8, as part of a plan afterwards abandoned. I do not find that any cases of importance on s. 17 have been reported since that time.—F. P.

THE TORRENS SYSTEM.

WE will soon have some practical experience of this much talked-of system of registration. The Act of last session comes into force on the first of July; and as all unpatented lands are at once brought under its operation, practitioners must soon familiarize themselves with its provisions.

Some of the sections of the Act apply to all lands in the Province and not merely to those registered under its provisions. The most important of these is as follows:—

“21. After the commencement of this Act, all lands in the Province of Manitoba, which, by the common law, are regarded as real estate, shall be held to be chattels real, and shall go to the executor or administrator of any person or persons dying seized or possessed thereof, as other personal estate now passes to the personal representatives.”

This almost takes one's breath away. It was once said by Mr. Justice Buller that if proper attention were not given to the doctrine of *scintilla juris* in discussing contingent remainders the constitution itself would be in danger. And now it makes one shudder to think what awful consequences may ensue upon the effacement of the whole law relating to freehold estates, and the consequent destruction of all our heirs. “A son and heir,” never so appropriate in this country as in England, must now be turned into “son and executor, or—if I don't make a will—administrator;” a phrase not nearly so euphonious, or so handy in case of a little pleasant embarrassment. It will be very hard to accustom one-self to the new conditions.

We will have, we suppose, to meet the troubles as they arise, and our present purpose is to suggest one topic for vacation reflection—and possible action:—Are the statutory short forms of deeds and mortgages of any further use? If not what is to be done until the next meeting of the Legis-

lative Assembly? The grant in both cases is to the purchaser or mortgagee *his heirs and assigns*. What is the effect of grant of a leasehold to a man and his heirs? The word *heirs* in that case cannot be a word of limitation. Is it a word of purchase? and if so, has it the effect of a settlement? Of course if the land were freehold, Shelley's case would apply, and the word *heirs*, would be a word of limitation and not of purchase. If a freehold were granted to A and his executors, a life estate only would pass. And a grant of a leasehold to A, without more, will pass the whole estate of the grantor (*Leith & Smith, 165*). If then, we repeat, there be a grant of leaseholds to A and his heirs, what effect is produced? The words are not words of limitation—for they are wholly inapplicable; are they words of purchase, and if so, is there a settlement? The answer may be very clear but as we get the Act only on the eve of going to press, we leave the solution to our readers.

At all events this much is clear, that the covenants in the short form Act are not suitable for a sale or mortgage of freeholds. The form of lease will do, because the Act says (sec. 10) that "that where the premises demised are of freehold tenure, the covenants . . . shall be taken to be made with, and the proviso . . . to apply to, the heirs and assigns of the lessor; and where the premises demised shall be of leasehold tenure, the covenants and proviso shall be taken to be made with, and to apply to, the lessor, his executors, administrators or assigns." But there is no similar provision as to the other forms.

Another important question that will arise upon this section, is as to the application of the Statute of Uses to any conveyance of land—a slip, we mean chattels real—after the Act comes into operation. The statute only refers to persons *seized*, and therefore has no application to terms of years. Has the whole statute been repealed or made obsolete? Conveyancers must be careful upon this point. A grant of land to A and his heirs to the use of B and his heirs, vests the legal estate in B. But a grant of a chattel

Interest with similar limitations is not affected by the statute, and the legal estate will remain in A.

Yet another point suggests itself. Will the Act relating to fraudulent preferences now apply to a conveyance of lands—again, we mean chattels real. It mentions *chattels*. Probably this would not cover leaseholds, but we are not clear upon that point.

Before leaving this section of the new Act, we would like to say in defence of Bracton, Coke and Blackstone, that the common law never regarded *lands* "as real estate," or as personal estate. Estates in lands might be either freehold or less than freehold; and in deference to the old classification we think that the statute might have more accurately provided that "Estates in lands which by the common law are regarded as freehold shall be held to be chattels real." We presume that this is what was meant.

Another important clause of the statute is as follows:—

"23. No devise shall be valid or effectual as against the personal representative of the testator, until the land affected thereby is conveyed to the devisee thereof, by the personal representative of the deviser, saving and excepting such devises as are made by the testator to his personal representative, either in his representative capacity or for his own use."

The draughtsmen of this clause is as unable as ourselves to get away from the old terminology. "Land" and "devise" certainly are associated in our minds, but there is no more use for *devise*, *bequeath* will suffice for chattels real.

There is to be no more difficulty in the way of a husband conveying to his wife:—

"26. A man may make a valid conveyance or transfer of his real estate to his wife, and a woman may make a valid conveyance or transfer of her real estate to her husband, without in either case, the intervention of a trustee."

Five clauses before this one we said good-bye to real estate forever we thought.

The common law-lawyers might not object to the reversal of their notions upon the subject of real estate, but they would certainly be entitled to complain of a statute which says that lands are not real estate, and then immediately provides that a husband may convey his real estate to his wife. What is covered by the words? Blackstone has nothing on the subject, and there is no explanatory note in the Act.

So far as we can judge from a hasty perusal, the other portions of the Act—those specially applicable to the new system of registration are reasonably clear. Some exceptions to this statement must be made. Sections 104 and 106, for example, are in conflict with one another, and the pivot section of the whole Act, 62, is a wonderful jumble. It would also have much facilitated a mastery of the statute if the effect of a certificate of title were all stated at one place instead of being scattered through the Act. For instance, by section 61 the certificate is stated to be subject to a number of minor matters that might form an objection to the title—taxes, easements, short leases &c; but no one would have any idea until the end of the Act was reached that possibly the certificate might be worth nothing at all. Under the heading "Miscellaneous Provisions," (sec 127), it is provided that every certificate "shall be void as against the title of any person adversely in actual occupation of, and rightfully entitled to, such land or any part thereof, at the time when such land was so brought under the provisions of this Act." This section deprives the Act of much of its benefit. Why all hidden difficulties may be obviated by a certificate, and such a palpable thing as possession not be a subject of settlement by the Examiner of Titles is not very apparent.

On the whole we are prepared to welcome the new system, and to give it a fair trial.

The officers appointed are as follows:—Registrar-General, James A. Miller, Q. C.; Examiner of Titles, Felix Chenier; and Accountant, E. H. Coleman.

EDITORIAL NOTES.

Tu Quoque.

After a long wrangle :—

Judge: "Well, Mr. ———, if you do not know how to conduct yourself as a gentleman, I can't teach you."

Counsel: "That is quite clear, my Lord."

—*Law Times (Eng.)*

The Law Society.

At the annual election of officers of the Law Society, the Hon. S. C. Biggs, Q.C., was elected President; J. A. M. Aikins, Esq., Q.C., Treasurer; and A. E. Richards, Esq., Secretary.

The Law Reports.

For the future the profession will be supplied by the Law Society with the reports. This is as it should be. Our annual subscription is as high as in Ontario, and for it nothing has heretofore been given in return. It is true that the establishment of a library is the first necessity, but the Society has not had poverty to plead. We take some credit for having brought, prominently before the bar, the advantages of a system of law reporting, and in this way of leading up to the new system. Our subscribers will receive THE LAW JOURNAL AND LAW REPORTS as heretofore, and the gift by the Society of the latter half of the current volume of the reports will be as valuable to them as to other members of the bar.

Exomptions.

A number of counsel are engaged, we believe, in the preparation of opinions as to whether an agreement to waive the benefit of the clauses of the recent Administration of

Justice Act as to exemptions, is or is not, valid. There is very little direct authority upon the question in England and in the United States the cases are in the most perplexing confusion. The practical difficulty seems to be this: A can license B to take and sell his (A's) goods, but can a license enlarge a statute? If a sheriff seize goods which by the Act are exempt and is sued in trespass, what can he plead? Can he plead anything but his writ—if his writ is that under which he seized? And if he plead his writ the statute will inevitably defeat him.

We venture to suggest that the following words will give the creditor the power which he desires:—"Upon default in payment of any note or renewal, A. B., his executors, administrators or assigns or his or their agents, may distrain my goods (without any exception or exemption) wherever they may be, and sell the same for the amount in arrear and the expenses of distress and sale." This document, but for the possibility of a breach of the peace in proceeding under it, would obviate all necessity of a judgment. But in practice it would be, no doubt, advisable to procure execution, and when placing it in the sheriff's hands give him a warrant under the license. He can then justify his seizure both under the writ and the license.

That such a power to take goods is perfectly good, will be apparent by considering that it is contained in almost every real estate mortgage. The point is worked out with another view in an article upon "Distress," 1 Man. L. J. 33.

THE
MANITOBA LAW JOURNAL.

VOL. II.

AUGUST, 1885.

No. 8.

APPEALS UPON QUESTIONS OF FACT.

“THE question was one of fact, and the jury has found for the plaintiff,” is the usual answer to an application for a new trial upon the weight of evidence. But this answer is not, and should not be, conclusive. It throws heavily the *onus* of argument upon the defendant, but the plaintiff cannot consider himself impregnable under its shelter. All the cases show no more than this, that *if the verdict be against the weight of evidence it must be set aside.*

Various attempts have been made to formulate a rule for the decision of such cases. Mr. Justice Dubuc, in *Maddill v. Kelly*, 1 *Man. L. J.* 280, states the effect of the decisions as concisely and fairly as it is usually done. He says that a verdict should only be reversed when it “is perverse, or clearly and evidently against the weight of evidence.” This simply means that if the verdict is against the weight of evidence, it ought to be set aside; for the words “clearly and evidently” merely imply that the judges are to be sure about the fact that it is so. They do not qualify the rule, that *if the verdict be against the weight of evidence it must be set aside.* They merely require that fact to be apparent and indubitable.

Judges under the pressure of work are too apt to decline an analysis of a large mass of evidence for the purpose of

ascertaining whether or not the verdict is consonant with it. And we cannot blame them. It rarely happens that something cannot be said for the verdict, and where counsel can raise a real contention it is an extremely difficult and laborious task to thoroughly master the evidence and decide upon all its bearings. There are many cases, however, in which it has been done; and, long as the evidence may be, and involved, an appeal upon a question of fact can only fairly be decided, if there be any reasonable doubt, after a thorough study of the testimony.

Douglass v. Ward, 11 Gr. 39, is a case in which the evidence as to an alleged fraudulent judgment was most thoroughly sifted and the first judgment overruled, although the learned judge (Spragge, V. C.) whose decree was in appeal remained of the same opinion as at the hearing. There are many cases in the reports of a similar character.

Returning to the later cases, *Solomon v. Bitton*, 8 Q. B. Div. 176, was an action of trover in which the evidence was very conflicting. The substantial question left to the jury was, whether they believed the plaintiff's or the defendant's witnesses. The jury found for the plaintiff. The Divisional Court ordered a new trial, the trial judge having expressed himself as dissatisfied with the verdict. The Court of Appeal reversed the order and directed the verdict to stand, holding that "the rule on which a new trial should be granted on the ground that the verdict was unsatisfactory as being against the weight of evidence, ought not to depend on the question whether the learned judge who tried the action was, or not, dissatisfied with the verdict, or whether he would have come to the same conclusion as the jury, but whether the verdict was such as reasonable men ought to have come to." This again merely means that *if the verdict be against the weight of evidence it must be set aside*, for in such case reasonable men ought not to have given such a verdict.

"Such as reasonable men ought to have come to." In *Grieve v. Molson's Bank*, 8 Ont. R. 162, these words are discussed. "It may well be asked what in fact is the effect of

the language 'such as reasonable men ought not to have come to?' All men are assumed to be reasonable, and unless circumstances show that the jury has acted corruptly or from improper motives, their finding would be the finding of reasonable men, and the verdict of a jury would become unassailable in the absence of evidence of their being influenced by corrupt or improper motives. A court composed of three reasonable men would be, otherwise, determining that twelve reasonable men, acting in accordance with their reason, were unreasonable. Thus it comes back to this:—Does, in the opinion of the court, the verdict do substantial justice; and, if not, is the evidence sufficient, in that opinion, to invoke the discretion appealed to, to interfere, to warrant such interference? If it is, then the court should exercise its discretion." We object to that part of this judgment which implies that if the verdict be against the weight of evidence there is any discretion in the court, on the ground of substantial justice having been done, to withhold a new trial. If there is anything we abominate it is "substantial justice," as the term is usually applied—for it is this, that while the law and the evidence are one way, the judge is the other. "Justice," as known to the law, and not "substantial justice," as known only to the judges, is what the courts are bound to administer.

Page v. Harrison is noted in the *Law Journal (Eng.)*, vol. 20, p. 337. It was an action brought by a medical man for a slander imputing to him that he had seduced the defendant's wife while attending her professionally. The defendant pleaded a justification to the effect that his statements were true. The action was tried before Mr. Justice Hawkins and a special jury; and, after a trial extending over several days, the jury found for the plaintiff for £150. The learned judge was dissatisfied with the verdict, and a Divisional Court, consisting of Mr. Justice Grove and Mr. Baron Huddleston, granted a new trial on the ground that the verdict was against the weight of evidence, a suit in the Divorce Court between the same parties having in the meantime proved abortive, the jury being unable to agree upon a verdict. The plaintiff

thereupon brought the present appeal against the order of the Divisional Court for a new trial. The Master of the Rolls, in giving judgment, said, that at one time it had been the habit of the court to accept the report of the judge who tried the case as conclusive. It had been thought, however, that this was going too far; and the rule, therefore, which they now followed was, that the court must judge for itself upon the whole case, whether the verdict was a reasonable one or not. It had been argued, however, that since the Rules of 1883 no account was to be taken of the judge's opinion, because he was precluded from sitting in the Divisional Court upon a motion for a new trial. That was ingenious but was not the meaning of the Rule. On the contrary, the greatest regard must be paid to the report of the judge who tried the case. After reading the evidence, it was clear that if the demeanour of the plaintiff was unsatisfactory, and that of the defendant and his witnesses was satisfactory, no jury should have given a verdict for the plaintiff. He could not but think that the cross-examination of the plaintiff indicated that he was not quite candid, while Mr. Harrison seemed to have given his evidence fairly. It had been argued that the servants' evidence was false in many respects; but if so, their cross-examination had not been sufficiently pressed home. Taking, therefore, the opinion of Mr. Justice Hawkins into account, together with other circumstances, the case came precisely within the principle of the decision in *Solomon v. Bitton*, L. R. 8 Q. B. Div. 176. The verdict was not satisfactory, and there must be a new trial. The Lords Justices concurred.

This case carries us no further than before, and proves once more that if the verdict be against the weight of evidence it must be set aside.

The latest case in our own court is *Miller v. Brown* (not reported). It was an action by a purchaser against a vendor, to recover purchase money alleged to have been paid under a contract into which the plaintiff was induced to enter by the fraudulent misrepresentations of the defendant. The fraud alleged was a representation that the land was situated

in Clearwater, whereas the fact was otherwise. The jury found for the plaintiff. In ordering a new trial, the Chief Justice delivered the judgment of the court, and said :—

“The second count is for fraudulent representation, that the land was in Nelsonville. There was a representation to that effect proved by plaintiff, and denied by defendant; the evidence of such representation most relied on was that contained in the deed itself. This, in my opinion, was the mere clerical error of the conveyancer, (he ought to have proved that himself) whilst the evidence charged that as defendant's fraudulent representation : whether the defendant himself represented the land to be in Nelsonville independent of the deed, is very uncertain.” “I cannot say there is no evidence of a misrepresentation. I think the evidence to the contrary very strongly preponderates. If the case had been before me as judge, and not before a jury, I should have found against the misrepresentation, but there was a jury, and their verdict cannot be ignored; there should be a new trial, costs to abide the event.”

The rule acted upon in this last case is that with which we started : *If the verdict be against the weight of evidence it must be set aside.*

It is strange that if there were any qualification of this rule no objection has ever been taken to the form of a rule *nisi* seeking to set aside a verdict on the ground that it is “against the weight of evidence.” Unless this be a good ground in itself, without qualification, then the form of the rule *nisi* is defective. But it has never been thought to be defective, and there can be no better ground given for setting aside a verdict than that it is against the weight of evidence. A point of law is more easily dealt with, but the facts in many cases involve the whole dispute. And there is no reason why a decision based upon a wrong view of the law should be reversed, and a decision based upon a wrong view of the facts should be allowed to stand.

"A wrong view of the facts." It is not so frequently that the judge or jury believe one man and disbelieve another; but that they have failed to grasp a harmonizing view of the testimony. The solution of the problem has not occurred to them, or having taken some prejudice early in the case they see the evidence that follows through partial spectacles. They have not got the facts before their minds in the right light or proper relation. One point has improperly shut out the others. Matthew Arnold takes what he calls a literary view of the Bible. That is, he refuses to take any one text, chapter, or book, but reads the whole and summarizes its teaching and tendency in a few words. It is easy enough to show him text after text which will not jump with his summation, but this does not affect his verdict. Juries must take a literary view, in this sense, of the evidence. Squeeze it all—not a portion merely—and give us the result to which the true weight of the evidence tends.

If this be omitted, it is then the duty of the appellate court to subject the facts to proper process, in order that right may be done.

A LAWYER'S CABINET.

THE popular prejudice against lawyers will be somewhat offended by the knowledge of the fact that all the members of Mr. Cleveland's cabinet, except one, are members of the legal profession. Mr. Cleveland himself is a lawyer, though not specially distinguished in his profession. Indeed, a lawyer who would quit his practice at thirty-five to take the office of sheriff, could not have possessed a very great love for his profession, and could not have achieved, or expected to achieve, any great success therein. On the contrary, the lawyers in the cabinet may, all of them, be set down as good lawyers.

Mr. Bayard, the Secretary of State, like several of our greatest men, did not have the advantage (or disadvantage) of a collegiate education ; but like the late Mr. Justice Byles, he did have the advantage of a business training before he commenced the study of the law. Instead of graduating from a college, he graduated from a Philadelphia counting-house into his legal studies, which he took up at the age of twenty, and pursued for three years before being admitted to the bar, which took place in 1851. Two years later he was appointed District Attorney for Delaware. He resigned his position in the following year, and devoted himself assiduously to his profession until his election to the National Senate in 1869, at the age of forty-one.

Mr. Endicott, of Massachusetts, will be recognized by all lawyers as Mr. Justice Endicott, who held a position on the Supreme Judicial Court of that State from 1873 until 1882. His opinions, running through many volumes of the reports of that State, speak sufficiently of his standing in the legal profession.

Mr. Whitney, the Secretary of the Navy, was, at the time of his appointment, a practitioner of the law in New York City. His principal distinction consisted in the fact that he was active, some years ago, in the crusade against the Tweed ring, in which he acquired the friendship of Mr. Tilden, which he never lost. Upon the downfall of the Tweed ring, he became corporation counsel for New York City, and made a reputation in litigations respecting fraudulent claims against the city, in which he is credited by newspaper biography with saving the city \$2,000,000. It is said that it was Mr. Tilden's intention, if inaugurated, to give him a seat in his cabinet. He married a daughter of Senator Payne, of Ohio, and this has given rise to sinister suggestions that the influence of the Standard Oil Company may have had something to do with putting him in the cabinet ; but we believe that there is no foundation for these suggestions whatever.

Mr. Vilas, of Wisconsin, the Postmaster-General, is the only representative in the cabinet of the twenty millions of

people of the great West and Northwest. He is also a lawyer of good standing and ability. He was one of the revisers of the edition of the Wisconsin Statutes published in 1878. Those who share in the ignorant prejudice against lawyers feel more inclined to criticise the appointment of Mr. Vilas, because it is said that he not only carries on his soul the sin of being a lawyer, but the darker sin of being a railroad lawyer. But as Mr. Lincoln was a railroad lawyer, having been the salaried attorney of the Illinois Railroad Company, it would appear that the circumstance of being a railroad lawyer does not place Mr. Vilas wholly beyond redemption's skill.

Mr. Lamar, of Mississippi, the Secretary of the Interior, is a lawyer, as are all Southerners who are prominent in political life. He is a distinguished figure in national affairs. At one time, shortly after the war, he held the position of professor of law in the University of Mississippi.

Mr. Garland, of Arkansas, the Attorney-General, is regarded by many as the ablest member of the bar of the Supreme Court of the United States. His appointment was one so eminently fit to be made, that its propriety has been universally recognized. He won his spurs, if we mistake not, in arguing the celebrated Test-Oath case in the Supreme Court of the United States, soon after the war.

Mr. Manning, of New York, the Secretary of the Treasury, must either be credited to the profession of journalism, or set down as a business man. He has been connected with the Albany *Argus*, in one way or another, since he was a boy, and has been president of the corporation which owns that paper since 1873. If Mr. Vilas has committed the sin of being a railroad lawyer, Mr. Manning has committed the equal sin of being a railroad director, having been, from 1869 to 1882, a director in the Albany and Susquehanna Railroad Company. He has also been a national bank director, and was, we believe, at the time of his appointment, the president of the National Commercial Bank of Albany. He is regarded as a successful organizer, a careful financier, and a shrewd business man.—*Am. Law Review*.

The Golden Rule.

SIC UTERE TUO UT ALIENUM NON LŒDAS.

(Continued from page 102.)

FIRE.—Apart from the distinction, raised by the statutes 6 Anne, c. 31, s. 6; and 14 Geo. III, c. 78, ss. 86 and 101, between house, and field, property, “the law is general; the fire which a man makes in his fields is as much his fire as his fire in his house; it is made on his grounds with his materials and by his order; and he must at his peril take care that it does not, through his neglect injure his neighbor. If he kindle it at a proper time and place, and the violence of the wind carry it into his neighbor’s ground, and prejudice him, this is fit to be given in evidence.” *Per Holt, C. J. in Turberville v. Stamp, 12 Mod.* These principles are said to have governed all the subsequent cases both in England and Ontario. *Furlong v. Campbell, 7 Ont. App. R. p. 162.* And they seem to be in accordance with the second of the rules above quoted.

Fire Caused by Railway Engines. If a company be expressly authorized by Parliament to use engines it is only liable in case of negligence. If not so authorized the common law rule (above No. II), applies. *Vaughan v. Taff, Vale R. Co., 5 H. & N. 579; Jones v. Festiniog R. Co., L. R. 3 Q. B. 733; and see Hammersmith R’y. Co., v. Brand, L. R. 4 H. L. 171.* Negligence may consist in failure to make use of the most effectual contrivances for preventing the escape of sparks, or in allowing combustible matter to lie upon the railway grounds. *Smith v. L. & S. W. R. Co., L. R. 5 C. P. 98; Furlong v. Campbell, 7 Ont. R. p. 165.*

IS NEGLIGENCE MATERIAL IN ASCERTAINING LIABILITY.—Is the second rule above quoted absolute, or may the defendant escape if he has been guilty of no negligence. Can a man bring water upon his land and in answer to an action for its escape say that he did all he could to keep it there. If there is any doubt of his ability to keep it there, should he have brought it? And if there is no doubt then he must be guilty of negligence.

“The question in general is, not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. He can excuse himself by showing that the escape was owing to the plaintiff's fault; or, *perhaps*, that the escape was the consequence of *vis major* or the act of God.” *Per Lord Cranworth, in Rylands v. Fletcher, L. R. 3 H. L. 341.* The careful “perhaps” of Lord Cranworth was altogether unnecessary if the decision in *Nichols v. Marsland, 2 Ex. Div. 1*, be sound. In that case it was held, not only that the act of God was a sufficient defence to an action for the bursting of the defendant's ornamental pools, (whereby the plaintiff was damaged), but that an extraordinary rain-fall which could not reasonably have been anticipated was an interposition of Providence. It is hard to see why the plaintiff in this case should have failed in his action. Extraordinary rain-falls will happen, and the damage was caused by the ornamental ponds being only strong enough for ordinary showers. An analogy may be sought in the spreading of fire by a sudden wind, in which case there is no liability. But the authorities apply to fires set out in the course of good husbandry, or for some other useful purpose. We know of no case where a man built a bonfire for his own amusement and was held not to be liable in case it got beyond his control and did damage. And the analogy between a sudden wind, which in all possibility will not arise during the continuance of a necessary fire, and an unusual rain-fall, which is sure to come some time, is not very convincing.

In the United States, negligence seems to be an important factor. Chancellor Wallworth in *The Mayor &c., of New York v. Bailey, et al* 2 Denio 433, lays down the law as follows:—"The degree of care which a party who constructs a dam across a stream is bound to use, is in proportion to the extent of the injury which will be likely to result to third persons, provided it should prove insufficient. . . . It is not enough that the dam is sufficient to resist ordinary floods. If the stream is occasionally subject to great freshets, those must likewise be guarded against. . . . Such a measure of prudence is required in such cases as a discreet person would see if the whole risk were his own." See also upon the same subject *Livingston v. Adams*, 8 Con. 175; *Losee v. Buchanan*, 51 N. Y. 476; *Marshall v. Wellwood*, 38 N. J. (Law) 339; *Hoffman v. Toulunne Co. Water Co.*, 10 Cal. 413; *Garland v. Torme*, 55 H. H. 55; *Todd v. Cochell*, 17 Cal. 97; *Everett v. Hydraulic Flume Co.*, 23 Cal. 225; *Lapham v. Curtis*, 5 Verm. 371; *Gray v. Harris*, 107 Mass. 492; *Shrewsbury v. Smith*, 12 Cush. 177; *Graham v. Gross*, 125, Mass. 238.

SNOW ON ROOFS.—For an injury resulting from the sliding of a mass of ice or snow from a roof upon a person travelling with due care upon the highway, the owner of the building is liable, if he suffers the ice and snow to remain an unusual time after he had notice of its accumulation, and ought to have removed it. *Shipley v. Fifty Associates*. 101 Mass. 251.

"There is no doubt that the owner of property is not liable for the flow of water, or the sliding of snow, to the injury of another, when such water or snow falls upon his land in a state of nature, or upon an erection that should not cause it to flow differently from what it would if it had fallen on land in a state of nature. But when the owner of property by an act of his does anything to cause the water or snow to be precipitated on his neighbor in an unusual quantity, or with unusual force to the detriment of that neighbor he becomes liable. It is his action, and not

the action of nature, that does the mischief, though without the action of nature the mischief would not be done." *Landreville v. Gouin*, 6 Ont. R. p. 461. The question whether there has been any negligence or improper construction of the roof, is a question for the jury. *Ibid.* Apart from these there is no common law liability. *Lazarus v. Toronto*, 19 U. C. 9.

ICE ON SIDEWALKS.—The defendants (in *Shelton v. Thompson*, 3 Ont. R. 11,) were the owners of a building on a street. A pipe connected with the eave trough, conducted the water from the roof down the side of the building, and by means of a spout, discharged it upon the sidewalk, where in the winter it was formed into a ridge of ice, upon which the plaintiff slipped and fell. The jury found that the defendants did not know of the accumulation of the ice, and that he ought not reasonably to have known of it. *Held* that the carrying of the water to the sidewalk was a harmless act; the action of the weather was the proximate cause of the accident; and the defendants not having knowingly allowed ice to accumulate, were not responsible. Armour, J., however, dissented upon the very reasonable ground, that the formation of the ice was the natural, certain, and well known result of conducting the water to the sidewalk, and that the defendants were, therefore, responsible for the result of their action.

OBSTRUCTIONS TO HIGHWAY OPPOSITE PLAINTIFF'S WINDOWS OR DOORS.—At first sight it might appear reasonable to say that if A. and B. have adjoining wharves, that A. should have no right to bring alongside of his wharf vessels which would necessarily overlap B's wharf; and yet when it is considered that each has the same right to use the water, the question comes back to whether or not A. is making an unreasonable use of it. If A. take a vessel alongside both wharves at a time when B. does not wish to bring in another vessel, B. cannot complain. *Original Hartlepool Collieries Co., v. Gibb*, 5 Ch. Div. 713. There is no differ-

ence in this respect between drawing up a vessel at your wharf and drawing up a carriage at your front door. The carriage may, quite necessarily, overlap your neighbor, but that will not, as necessarily, give him a cause of action.

If instead of a carriage, however, you constantly kept large waggons close to your neighbor's window, loading and unloading goods, he might very fairly complain that you were abusing your privilege ; and if his light were materially diminished he might well have an action. *Benjamin v. Storr*, L. R. 9 C. P. 400.

EDITORIAL NOTES.

Queen's Counsel.

IN England the creation of Queen's Counsel proceeds in a manner very different to that to which we are accustomed. In Canada every barrister covets the title, while in England there are but few juniors who can afford the assumption of the honor. Etiquette requires that a Q.C. should in all cases be provided with a junior; and the effect of this is, that while a barrister, as a junior, may command a steady supply of single briefs, his talents may not be sufficient to secure the leading place in cases where two counsel are to be employed. While a junior he may take a brief and attend to the whole case. If he become a Q.C. he cannot hold the same brief unless the client will pay for a junior.

In this way it comes about that a stuff gownsman considers very carefully his hold upon his briefs before he applies to the Lord Chancellor for a patent of precedence. Not until he is confident of his position at the bar (or until he desires to leave practice) does he make his application, and without an application the patent is not conferred. The appointments being, therefore, very largely the outcome of merit, are extremely limited. It is probable that there are more Queen's Counsel in Canada to-day than in all England. After a very long delay in new creations the present Lord Chancellor has issued patents to what is spoken of as "a large number" of barristers. The "large number" being ten!

In referring to these appointments the *Times* (Eng.) says:—"Thus the new Lord Chancellor has, a few days after coming into office, done what Lord Selborne declined for months to do. About a year ago most of the new Queen's Counsel applied to be allowed to change stuff for silk. Their request was not granted. They were given to understand that the state of legal business did not require the

creation of more Queen's Counsel. Perhaps this was the right view to take ; and if it was, matters have not materially changed since last November. A generation or two ago the number of Queen's Counsel might be almost counted on one's fingers. They were men of unquestioned eminence ; their reception of official rank merely ratified an opinion which their profession had already pronounced. Few thought of applying for the honor without carefully counting the risk of losing the business which they had acquired as juniors, and examining carefully into what vacancy they might step. It was the unwritten law that there should be no creation until the death or elevation to the bench of a leader in a Vice-Chancellor's court, or on circuit, made it desirable to fill up a gap. But under more than one Chancellor, and for many years, there has been a policy of profusion, and the names of Queen's Counsel now fill two and a half pages of the law list. Patents have been given not only to those who have succeeded in their profession, but to those who, having failed, wish to make a dignified exit from it. The title has long since ceased to be significant of anything. To suitors it is no guide to fitness ; and often it would be equally hard for the donor and the recipient to explain why the gift was ever bestowed. We took occasion some months ago to question the value, in a public point of view, of the retention of a distinction which often dooms a barrister, who has made a mistake in taking silk, to do nothing, or try vainly to do that for which he is unfit. But Queen's Counsel are not likely to go the way of serjeants for many a day to come, and in the meantime nearly a dozen new 'silks' are appointed to keep up the order."

The County Court of the Eastern Judicial District.

HIS HONOR JUDGE PRUD'HOMME.

By an Order in Council of the 21st July last the Eastern Judicial District has been divided into three divisions for County Court purposes. The Counties of Fairford, Marquette, d'Iberville, Morris, Lorrette and Carillon are to form the Central Division; the Counties of Selkirk, Varennes, Lisgar, Plessis and Gemli, the Northern; and the Counties of Rock Lake, Dufferin and Manchester, the Southern.

The necessity for this division has been for long time apparent—the work was too great for one man to cope with it. Eventually there may be a judge for each division. Meanwhile, however, it is understood that Judge Ardagh will preside in the Northern and Southern divisions, leaving the Central for M. L. A. Prud'homme, who, we are glad to notice, has been appointed to that position.

M. Prud'homme, we have no doubt, will discharge his duties faithfully and well. His division is largely populated with those speaking his own language, and it was, therefore, necessary and proper that some one of his nationality should fill the position. At the same time no interpretation of English evidence will be necessary, M. Prud'homme being thoroughly familiar with both languages. In common with most of his race, M. Prud'homme has this great advantage over British or Canadians—using this term as opposed to French Canadians. We trust that he may be long spared to fill the honorable position to which he has been called.

THE
MANITOBA LAW JOURNAL.

VOL. II.

SEPTEMBER, 1885.

No. 9.

LARCENY.

The Cabman's Case.

THE case of *Regina v. Ashwell* has given rise to much discussion and difference of opinion in England. When the case first came before the Court for Crown Cases Reserved it was thus noticed by *The St. James' Gazette* :—

“ If a sovereign is given to a cabman by his fare, both parties believing it to be a shilling, and an hour later the cabman discovers the mistake and keeps the sovereign, has he stolen it? The argument of this question before the Court for Crown Cases Reserved last week afforded excellent entertainment to a professional audience. The difficulty is, that to ‘take and carry away *animo furandi*’ is an essential part of the common-law definition of larceny, and that in this case the cabman did not form a felonious intention about the sovereign when he took it and carried it away, because he then believed it to be a shilling. On behalf of the Crown it was argued that either he took it when he knew it was a sovereign, or the felonious intention which he subsequently formed relates back to the time when he took it. Before the argument had gone far it was apparent that the five judges who were hearing the case were not agreed, and while Lord Coleridge had no doubt that the

sovereign was stolen, Mr. Justice Stephen was equally positive that it was not. Mr. Justice Cave further complicated matters by throwing out a suggestion that the cabman might have committed the statutory offence called larceny by a bailee. In the result the Lord Chief Justice announced that the Bench was so seriously divided in opinion that there must be a further argument before the full court—that is the whole Queen's Bench Division."

Accordingly a re-argument took place before the thirteen judges, when the majority were of opinion that the conviction was right.

A somewhat similar case is *Reg. v. Macdonald*, in which the question was whether a minor, who had purported to enter into a contract for the hiring and purchase of furniture, and who had sold it before he paid all the instalments, could be convicted of larceny. In this case also a majority of the judges confirmed the conviction.

The Law Journal (Eng.) sides with the minority, and it seems to have much authority in favor of its contention.

Roscoe's definition of larceny, as modified by a suggestion of Sir James Stephen, and in this form adopted by Mr. Harris, is as follows:—"The wilfully wrongful taking possession of the goods of another with intent to deprive the owner of his property in them." This definition will be of no further service, for it is quite clear that there did not exist any wrongful intent—nor indeed any wrongful taking.

But for the statute relating to bailees, it was believed that there was no case in which a person having wrongfully converted to his own use that which he had come into possession of innocently could be convicted of larceny. *Harris*, 212. It was thought that there must exist the *animo furandi* at the time of taking.

For example, where A went to a shop and said that C wanted some shawls to look at. The shopkeeper gave the shawls to A, and A converted them to his own use. This is larceny if the design of so converting was present when

the possession was obtained; but it was thought not to be larceny if such design was conceived subsequently to the rightfully obtaining possession. *R. v. Savage*, 5 C. & P. 143. "Though the person thus obtaining possession afterwards fraudulently appropriated the goods to his own use, he would not be guilty of larceny at common law." *Harris* 211.

But we will allow *The Law Journal* to speak for itself:—

"In regard to the question raised in *Regina v. Macdonald*, we sympathise with the dissentient judges. At common law there could be no larceny without a trespass. A statute says that a bailee who fraudulently converts to his own use goods bailed to him may be convicted of larceny. An infant fraudulently converts to his own use goods of which, if he had not been an infant, he would be bailee. Is he guilty of larceny? The answer seems to be in the negative. There is no dilemma. He is not guilty at common law, because he has committed no trespass, and he is not guilty by statute, because he is not a bailee. His proper legal description is that of licensee, and if it had been decided that a licensee who does something inconsistent with the license becomes a trespasser and, if a fraudulent intent be added, a thief, the decision would have been intelligible. But the various *reductiones ad absurdum* put several times by the judges do not help to a conclusion. They would help if the law of larceny were based on reason, but it is not. It had its origin in days when most crimes were crimes of violence, and it has been toned down by the judges in days when it was a hanging matter. The suggestions made by the learned judges in the course of the argument were valuable to the Legislature, but did not elucidate the question in hand. Some positions of law, however, seem to have been assumed without warrant. It appears to have been supposed that if a chattel is lent to an infant, and he sells it, there would be no remedy unless he was guilty of larceny. He would, however, be guilty of a conversion, upon which he could be sued. The assemblage of a dozen judges to decide a point of criminal law greatly

imperils its proper decision. They are apt to treat the matter from the point of view of common sense and convenience rather than law, and support one another in so doing. They become less a forum than an assembly of gentlemen settling among themselves what is right and wrong."

In this connection it may be noticed that if there be the *animus furandi* at the time of acquiring possession, the fact that the owner willingly hands over the chattel to the accused is no defence if the transfer has been brought about by some deception. A good example of this kind of larceny was recently decided in the Supreme Court of Michigan, in *People v. Shaw*, where the facts were as follows:—

S. introduced himself to B. as a traveler for a tea-dealing firm in Cincinnati, and told him that one of the means used for getting custom in a new place was offering purchasers a chance, by drawing cards, to get fifty pounds free, in addition to the purchase, if they drew the winning card. In order to carry out the scheme, he wanted B. to accompany him, and showed him how to draw the lucky card, by a little dot on the back. While they were practicing, and B. succeeded each time in drawing the card, J., a confederate of S., came up, appearing to be a stranger, and inquired what they were doing, and S. told him he would show him, and gave him the same explanation as to the mode of selling tea, but did not tell him about the marked cards. S., after some talk, said that B. could draw the fifty-pound card. J. offered to bet \$100 that he could not, and held out to S. what seemed to be a roll of bills. S. said he had not the money, but had a \$300 check. J. said he did not want the check; he wanted the money. S. asked B. if he had it. B. said he had not \$100, but had \$80. B., at S.'s request, handed him the \$80, and S. whispered to him to draw the marked card. He drew it, and it was a blank, and S. at once handed the money to J. *Held*, larceny.

THE ROMANCE OF LAW.

The Swinfen Case.

SOME thirty years ago there dwelt in Staffordshire an old country gentleman named Sam Swinfen, the possessor of an estate valued at between 60,000*l.* and 70,000*l.* He had inherited his property somewhat unexpectedly, and for many years he and his wife passed a secluded life in two rooms of the old mansion ; on her death in 1848, however, he invited his only son, H. I. Swinfen, to take up his abode with him. This the younger man did, bringing with him his wife, with whom he had contracted a romantic marriage against his father's approval. The old sore was healed, and a complete reconciliation took place. The son set about improving the estate with marked success, and all went well till the latter's sudden death in 1854. The father was now eighty years of age, and in a state of physical, and as it was then thought, mental paralysis. In fact, friends of the family, writing in the widow's behalf, in answer to letters of condolence, stated that 'old Mr. Swinfen was happily spared the shock, being incapable of understanding the loss he had sustained.'

The old gentleman, in fact, was not insane. He knew that in default of a will the estate would pass to the heir-at-law and representative of his predecessor, Captain Swinfen, of the 6th Dragoon Guards, and after due consideration he gave instructions for and executed a will, whereby he devised the whole property to the widow. The will was made on July 7, 1854, and on the 26th of the same month the testator died.

Thereupon Captain Swinfen cast about for means of upsetting the testament, and invoked to his aid the old familiar friend of lawyers—'mental incapacity.' He filed a bill in Chancery, and by consent an issue *devisavit vel non* was sent down for trial, and came on for hearing before Cresswell, J., and a special jury at Stafford Assizes on Saturday,

March 15, 1856. For the widow, plaintiff, on the issue, Sir F. Thesiger, afterwards Lord Chancellor Chelmsford, was specially retained to lead, and on the other side appeared the famous Chief Justice Cockburn, then Attorney-General.

On the first day's hearing the ladies who had written the letters after the son's death were called, and in cross-examination admitted their previous statements as to the old man's incapacity to recognise his loss, he having actually stated to one of them that the person dead was Mrs. Swinfen. Other damaging points also were made against the will, and Thesiger was so impressed that he sent for the widow to his lodgings, and strongly urged her to leave the matter in his hands to settle as best he could. Thesiger led the widow to understand that the defendant offered to settle on her an annuity of 1,000*l.* if she would give up the estate. This, with that courage and pertinacity she showed from beginning to end of the litigation, she absolutely refused. She was ultimately prevailed upon to take the night to think the matter over, but next morning saw no change in her determination, and she telegraphed to Thesiger, 'offer refused.' We may judge then her astonishment when, on arriving at court on Monday morning she was met by her counsel leaving the court room, and coolly informed that he had done the best he could for her, and had settled the matter on the terms originally proposed.'

But if the heir had a verdict the widow had possession, and to possession she clung. From the beginning she had asserted that she would stand or fall by the will, and at this crisis she rose to the occasion like Maria Theresa, and abandoned by all she quietly returned to the hall and awaited events. Speedily possession was demanded and refused. The heir's next step was to take a rule *nisi* for attachment against her. This was quashed on the ground of insufficient proof of disobedience (*Swinfen v. Swinfen*, 25 *Law J. Rep. C. P.* 303); but the Court, consisting of Cresswell, Williams and Willes, all seemed to agree that the compromise was binding.

Another rule accordingly was taken out (*Swinfen v. Swinfen*, 26 *Law J. Rep. C. P.* 97), in answer to which Mrs. Swinfen made an affidavit setting out all the facts. Fortunately for her, Crowder, J., happened to be sitting this time, and he held distinctly that the mere relationship of counsel and client did not give a general power to compromise, and that there was no special authority shown, but on the contrary an emphatic repudiation. The other judges held to their previous views, but the practice of the Court being to confirm rules for attachment only when the judges were unanimous, the rule fell through, and the widow escaped as by fire.

The heir, who evidently had more confidence in the verdict already obtained than in the result of a fresh trial, went to Chancery with a supplemental bill for a decree for a specific performance of the compromise (*Swinfen v. Swinfen*, 27 *Law J. Rep. Ch.* 35). And now a fresh actor appeared upon the scene, in the person of Kennedy, a provincial barrister practising at Birmingham, who had taken up the forlorn widow's cause, and who proved a champion very different from Thesiger. The Master of the Rolls (Romilly), in an able and exhaustive judgment, rejected the compromise, taking the same view as Crowder, that counsel had no power to give estates away at his own discretion. He instanced with approval a case within his own knowledge where a great advocate had in open Court refused to consent to a compromise actually agreed to by his client, on the ground that the client did not understand the sacrifice he was making; and, refusing the specific performance prayed, he ordered a new trial.

This judgment was the first crumb of comfort that had fallen to the widow's lot, but was, of course, far from pleasing to the heir, who appealed only to get an excoriation from the Lord's Justices (*Swinfen v. Swinfen*, 27 *Law J. Rep. Ch.* 69), Knight Bruce observing that the heir's attempt was only a *pis aller*, and varying the Master of the Roll's decision in the widow's favor so far as to give her costs of the suit.

The new trial accordingly came on at Stafford in March, 1858. The evidence of the letters remained, but a mass of other evidence was put in, all tending to show that the testator's mental faculties, if impaired at all, were not so damaged as to deprive him of testamentary competency. The judge summed up against the widow, but the jury were not influenced by his lordship and returned a verdict establishing the will, a result due principally to the able advocacy and thorough mastery of the case displayed by Kennedy.

The heir was not yet shaken off, however. He went to the Master of the Rolls for a new trial (*Swinfen v. Swinfen*, 28 *Law J. Rep. Ch. 849*), but far from getting it the Master stated that had the verdict been otherwise he would have sent the case down again. In the course of argument Kennedy went far and wide for instances of physical imbecility combined with mental competency. Many eminent characters in history were referred to, among others the great Marlborough, who, stricken with paralysis, his mouth awry, unable to articulate, was yet competent to make a most important codicil just before his death. Lord Eldon, the famous Chancellor, Sir Herbert Jenner Fust, who suffered from the very disease which affected the testator, and a recent judge (not named) who, though struck with hydrocephale, yet performed his duties with 'transcendent ability' to the very last. The whole report, in fact, is well worth reading by the student of medical jurisprudence.

The writer ventures to think from his limited observation of human nature, that the desire for vengeance is usually stronger with the fair sex than with their *soi-disant* lords and masters. Mrs. Swinfen was no exception to this rule. Flushed with victory she now entered the lists against her late counsel, the august Chancellor himself, and sued Lord Chelmsford for damages for a 'fraudulent' compromise against instructions (*Swinfen v. Chelmsford*, 29 *Law J. Rep. Ex. 383*). This, however, was a little too much, and the Court unanimously dismissed her suit, and settled by its

decision the powers and responsibilities of counsel. And here, if this were a novel, and not a statement of facts, would come the obvious and happy conclusion—viz. the marriage of the plucky widow to her devoted advocate, and the usual notice in the *Times*: ‘St. George’s, Hanover Square—Swinfen to Kennedy. No cards.’ But unfortunately the affairs of mankind seldom end correctly. Mrs. Swinfen did not become Mrs. Kennedy, but she did become Mrs. Broun, and thereupon followed another great suit—viz. the leading case of *Kennedy v. Broun and Wife*, 32 *Law J. Rep. C. P.* 137. Kennedy alleged that, having given up his other practice, and devoted himself wholly to the advocacy of the widow’s rights, both at the bar and by writings and pamphlets ‘designed to render her cause popular,’ she had agreed in return to pay him a fee of 20,000*l.* in the event of success, and for this sum he sued. Upon the argument English common lawyers became civilians for the nonce, and went deep into the mysteries of the *lex cincia*, and the old usages of the Roman patrons and advocates. Erle, C. J., presided, and delivered perhaps his finest judgment, settling what in fact had hardly before been seriously doubted, that an English barrister’s fee is an *honorarium*, and cannot be made the subject of a legal claim. He was terribly hard on poor Kennedy, but as a specimen of judicial eloquence his deliverance can hardly be surpassed, and we cannot resist the temptation of quoting therefrom the following description of a model advocate: ‘We are aware that in the class of advocates, as in every other numerous class, there will be bad men taking the wages of evil and therewith also, for the most part, the early blight that awaits upon the servants of evil. We are aware also that there will be many men of ordinary powers performing ordinary duties without praise or blame; but the advocate entitled to permanent success must unite high powers of intellect with high principles of duty. His faculties and acquirements are tested by a ceaseless competition, proportioned to the prize to be gained—that is, wealth and power and honor without, and active exercise for the best gifts of

mind within. He is trusted with interest and privileges and powers almost to an unlimited degree. His client must trust to him at times for fortune and character and life. The law trusts him with a privilege, in respect of liberty of speech, which is, in practice, bounded only by his own sense of duty, and he may have to speak on subjects concerning the deepest interest of social life, and the innermost feelings of the human soul. . . . If an advocate with these qualities stands by the client in the time of his utmost need, regardless alike of popular clamour and powerful interest, speaking with a boldness which a sense of duty can alone recommend, we say the service of such an advocate is beyond all price to the client, and such men are the guarantees to communities of their dearest rights, and the words of such men carry a wholesale spirit to all who are influenced by them. Such is the system of advocacy intended by the law; requiring the remuneration to be by gratuity.' And he then proceeds with little difficulty to show, from a long course of precedent, that such an action as the present could not lie.

After this nothing was left for Kennedy but ruin, to which he added disgrace, by certain unsavoury statements made in the bitterness of despair. He was disbarred, and died heartbroken, perhaps the only instance of a lawyer who saved his client and ruined himself.

As for Mrs. Swinfen, she may, for all the writer knows, still be living full of years and honors at Swinfen Hall, but if so, she is the sole survivor of the *dramatis personæ* in the 'Swinfen cases.' Thesiger, Cockburn, Romilly, Knight-Bruce, Erle, and all the other erst famous advocates and judges who figured in this long litigation, have now passed to a world where, it is to be presumed, briefs and special retainers are unknown, and new trials are not allowed.—
Albany Law Journal.

AMENDMENTS.

IN *Cameron v. Perry*, 2 *Man. L. J.* 231, Mr. Justice Killam is reported to have held, that if, in his opinion, the plaintiff ought to be allowed to amend his declaration, then it must inevitably follow that the defendant should have full liberty to add as many new pleas as he desired to add, and that the judge had no power to prevent him so doing. We think that it is extremely unfortunate if this be the state of the law. It would not be difficult in many cases for a defendant to raise such totally new defences as would effectually defeat the plaintiff—defences of which, until that moment, the plaintiff was entirely ignorant.

But we submit, with great deference, that the plaintiff may be allowed to amend "*upon such terms as to the Court or judge may seem fit*"; and that the terms (besides the question of costs) ought to be, that the defendant should be at liberty to plead what he liked *to the new matter*; but that he should only be allowed to add pleas, which might have originally been pleaded, upon an application being made by him for that purpose—an application that would be dealt with separately from that of the plaintiff. The learned judge's opinion seems to have been based upon the idea that when a new declaration is filed the defendant should be unhampered in drawing his pleas. The fallacy, we venture to suggest, is in treating an amended pleading as a new pleading.

WAIVER OF DAMAGES FOR DELAY.

IF A. agree to sell goods to B. and to ship them by a certain date, will B. by accepting the goods when they arrive be estopped from suing A. for delay in shipment? In *Coristine v. Menzies*, 2 *Man. L. R.* 84, it is said that the acceptance would be a waiver of any damages for the delay. We can readily understand that if, after the delay, there be a new bargain between the parties providing for the acceptance of the goods upon certain terms, that in such case the purchaser must be held to have waived all damages, or rather that any possible damages would be held to have been satisfied by the new contract. And in the case mentioned there was a new contract relating to the acceptance of the goods. It is the dictum: "Since having received them, even in the absence of the bargain made to give additional time, I think she has waived any cause of action arising from delay in shipping"—that we desire to call attention to.

Acceptance of goods will not waive a breach of warranty as to the quality of the goods, and it is not very apparent why it should waive the delay. We can find no authority for the proposition, and we cannot help thinking that if an opinion upon the point had been necessary for the decision of the case, the learned judge would have come to a different conclusion.

CORRESPONDENCE.

To the Editor of the Manitoba Law Journal.

SIR :

No publication makes its appearance with greater regularity than the Yearly Amendment to the County Courts Act, and as it feeds upon itself—the enactments of one year necessitating the amendments of the next—there is no immediate prospect of the process stopping.

One Section—the twenty-fifth—of the instalment of 1885 is worth considering. It is as follows: "As between the assignee of a debt or chose in action, and a garnishee, whether the garnishee order shall have been issued before or after judgment, priority of service, or notice, on, or to, the garnishee shall govern the right of the parties, subject to the question of *bona fides*, and such defence and rights otherwise as may now be set up in garnishee proceedings in said County Courts."

The intention may have been good, though it is difficult to see why a perfectly *bona fide* assignment should be defeated by a garnishing order subsequent to it, merely because the garnishee gets prior notice of the order, so long as he has not altered his position; but apart from this the effect of the section is peculiar. Suppose a *bona fide* assignment to be made on the 1st, a Queen's Bench garnishing order to be obtained and served on the 2nd, and a County Court garnishing order on the 3rd, and notice of the assignment to be given the garnishee on the 4th. As matters now stand the assignment being before the Queen's Bench order cuts it out, the Queen's Bench order being before the County Court order cuts it out, and under the section in question the County Court order cuts the assignment out.

Who will get the money? The garnishee seems to occupy the most enviable position.

Would it not be well for County Court legislation to confine itself to its legitimate sphere, the regulation of County Court practice and procedure? Changing principles of law under the pretence of amending the procedure of an inferior court should not be encouraged.

Yours, &c.,

X.

X raises a nice question. The case is this: Of three claimants to money in the hands of K., A. is entitled to priority over B.; B. is entitled to priority over C.; and C. is entitled to priority over A. At first sight it may appear that K. having possession has decidedly the best of it, but cases not less difficult have been presented for decision, and have been decided, as between the claimants. Perhaps some of them may help our correspondent.

By an English statute an unregistered bill of sale is void as against an execution creditor or assignee in bankruptcy, but not so as against a subsequently registered bill of sale. This being the law the perversity of events produced this difficulty: A. held an unregistered bill of sale; B. a registered bill of sale; and C. was an execution creditor. A., therefore, was entitled to priority over B., B. over C., and C. over A. The question came up upon interpleader, when C. permitted himself to be barred, presuming, we suppose, that B's claim was valid as against him. The way now seemed clear for A. He has only B. to contend with, and by the hypotheses if there were no C., A. is first in order. But it was held otherwise, and the first, as prophesied, turned out to be last. And it was reasoned out in this way: As between A. and C., C. was entitled and if B., succeeding against C., must in his turn give place to A., then, in fact, as between A. and C., A. gets the money. It therefore appears that although at the time of the execution of B's bill of sale he took subject to A's bill, yet the subsequent existence of an execution against the mortgagor reversed the priorities. The case we have been referring to is *Richards v. James*, L. R. 2 Q. B. 285.

In a more recent case, *In Re Barrand, Ex parte Cochrane*, 3 Ch. Div. 324, there was an unregistered bill of sale to A., a registered bill to B., and an assignment in bankruptcy to C. Here again is the circle of priorities. The contest was between B. and C. and again B. was victorious. And there was the same result in *Ex parte Leman, in Re Barrand & Co.* Ch. Div. 23.

Applying these authorities to our correspondent's case B. "seems to occupy the most enviable position."—[ED. MAN. L. J.]

REVIEWS.

SMITH ON CONTRACTS.—There seems to be no end of editions through which the celebrated lectures of Mr. John William Smith are to pass. We have to hand the seventh American, from the eighth English edition published by T. & J. W. Johnson & Co., 535 Chestnut Street, Philadelphia, carrying with it the notes of Vincent T. Thompson, William Henry Rawle, George Sharswood, and John Douglass Brown, Jr.

To a Canadian lawyer, the book has the same defect apparent in most of our text books—there are no Canadian cases cited. Many passages would be largely elucidated by Ontario and Manitoba precedents. For example, it is said at page 8: "where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to show that he did not intend it to operate immediately, it is a valid and effectual deed; and delivery to the party who is to take by it, or any other person for his use, is not essential." This is far from clear. By hypothesis the deed is "sealed and delivered," but that being so "delivery

is not essential." The notes, certainly, are of value here, but by how much would they not have been enriched by reference to *Bank of Montreal v. Baker*, 9 Gr. 97, and *Bank of Toronto v. Cobourg, Peterborough and Marmora Ry. Co.*, 7 Ont. R. 1. Again, when treating of escrows, we miss the well known case of *Oliver v. Mowat*, 34 U.C.R. 472, deciding that even registration of an instrument will not change it from an escrow to a deed.

In comparing the notes with the text, we cannot help being struck with the fact that many of the States have broken away from mere maxims and forms, still ruling in England, where a more sensible view requires the introduction of a more sensible rule. For example, in the text, we find it stated (p. 30) that in *West v. Blakeway*, a tenant had covenanted not to remove a greenhouse, and it was held no defence for him against an action for so doing, that he had his landlord's subsequent permission so to do, *that permission not being shown to have been under seal*. In the notes the rule is shown to have been too rigid for American notions of law and justice.

It is just this feature of American books that makes them valuable to the profession in our western Province. Not that we advocate the substitution of American for English precedents. On the contrary, we have the very highest respect for English authority. But we do think that both in England and Ontario, in many lines, the law has, by dint of piling precedent upon ill-fitting precedent, and the application of principles in ill-conceived methods, become crabbed and unreasonable; and that a well-regulated kick over the traces occasionally, in American fashion, will do no harm.

The text of the book now in review has long since passed into the classics of legal literature. Of the present edition, and especially the notes, we may be permitted to say that, with the exception noticed, the work appears to have been excellently done. One does not, of course, look for the fullness of Addison; but we are well content to have continued for us the clearness of Smith.

THE
MANITOBA LAW JOURNAL.

VOL. II.

OCTOBER, 1885.

No. 10.

IGNORANTIA LEGIS NEMINEM EXCUSAT.

A Rule in Criminal Cases; not in Equity.

THIS is an undoubted rule of law for application in criminal cases. But in equity we maintain that it is of no more validity than if it read, *Ignorantia facti neminem excusat.*

We are aware of much authority against this statement, and that the text-writers almost unanimously deal with mistake of fact, and mistake of law, as matters requiring separate treatment. For example, Lord Chelmsford in *Midland G. W. Ry. Co., v. Johnson*, 6 H. L. Ca. p. 810, said, "Mistake is undoubtedly one of the grounds for equitable interference and relief; but then it must be a mistake not in matters of law, but a mistake of facts." So also Mr. Pollock, in his work on Contracts says, that as a general rule "Relief is given against mistake of fact, but not against mistake of law,"—(3rd Ed. p. 420); and again at page 424, "While no amount of mere negligence avoids the right to recover back money paid under a mistake of fact, money paid under a mistake of law cannot in any case be recovered."

This proposition is considerably modified in *Broom's Legal Maxims*, 256: "Money paid with full knowledge of the facts, but through ignorance of the law, is not recoverable if there be nothing unconscientious in the retaining of it; and 2nd, money paid in ignorance of the facts is recoverable,

provided there have been no laches in the party paying it, *and there was no ground to claim it in conscience.*" This writer seems to think that these propositions are antithetical ; but apart from the laches, and the obscurity of the duplication of negatives, they are almost identical. The extract supports our contention when read in this way : " money paid in ignorance of law is recoverable, if there be anything unconscientious in the retaining of it ; 2nd, money paid in ignorance of facts is recoverable, if there was no ground to claim it in conscience." The true criticism of the passage, however, would be that in the first of these propositions the words "facts" and "law" may be safely transposed for a converse rule ; and the second is inaccurate. Inaccurate, because while there may not, as a matter of fact, be any ground for claiming the money, the parties may have agreed to take their chance of the truth, and having so contracted, are bound.

In *Snell's Equity* mistake of law is disposed of by saying that, as a general rule, ignorance of law is no ground for the rescission of a contract ; and the only two qualifications mentioned are, (1) That the term *law* in the maxim refers to the general law of the country and not to private rights ; and (2) That if a party acting in ignorance of a clear and settled principle of law is induced to give up a portion of his indisputable property to another, under the name of a compromise, a court of equity will relieve him from the effect of his mistake. Mistake of fact is then treated of under the headings of mutual and unilateral mistake.

True Method of Treating Mistake of Law and Fact.

It is the object of this article to show that the true method of treating relief in equity, upon the ground of mistake of law and mistake of fact, is to place them, not in opposition, but together ; for, as will be shown, the same principles apply to both. Wherever relief would be given upon the ground of mistake of fact, under analogous circumstances, the mistake being one of law, relief will also be given.

Mr. Bigelow's Proposed Test.

Before proceeding with the argument, however, we wish to notice an article which appeared in a late number of *The Quarterly Review*, in which Mr. Bigelow proposes a test, to which the question of the right to rescind under a mistake of law, may be brought. "The case of *Hunt v. Rousmaniere*, 8 Wheat. 174; S. C., 1 Peters, 1," he says, "decides, then, this very intelligible and sound principle, that where a particular course is taken upon deliberation, in preference to another present to the minds of the parties, that action, so far, is final." For example, we suppose, if a married woman agrees to sell to A. her real estate, and a stupid conveyancer advises that a conveyance by the husband, with a bar of dower by the wife, is a form preferable to one in which the wife is a grantor, and the parties thereupon adopt the wrong form, the purchaser is without remedy. We propose to show that this is *not* the law.

Hunt v. Rousmaniere : What It does not Decide.

We are afraid that Mr. Bigelow has misread *Hunt v. Rousmaniere*. It is certainly no authority for his proposition, and its *dicta* are destructive of his test. The facts of the case were as follows:—Hunt agreed to lend money to Rousmaniere upon the security of two vessels. Advice of counsel was taken as to the form of the security, and a power of attorney giving authority to sell the property, was agreed upon, under the mistaken idea that by this means the vessels would be charged with the payment of the debt. The debtor having died, and the power of attorney being therefore at an end, the lender asked to be declared to be entitled to a mortgage upon the vessels. He was unsuccessful, not upon the ground mentioned by Mr. Bigelow, viz., that a particular course was taken upon deliberation in preference to another present to the minds of the parties, but upon the ground that *the agreement* was for a power of attorney, and that *there was no agreement at all to give a mortgage*. The Court in its judgment said, "This is not a bill asking for a specific performance of an agreement to

execute a valid deed for securing a debt, in which case the party seeking relief would be entitled to a specific lien, and the Court would consider the debtor as a trustee for the creditor of the property on which the security was agreed to be given. The agreement has been fully executed, and the only complaint is, that the agreement itself was founded upon a misapprehension of the law, and the prayer is to be relieved against the consequences of such mistake."

1 Peters 17.

Hunt v. Rousmaniero : What It does Decide.

The case, therefore, decides nothing but this, that where *an agreement* is made under a mistake of law, the Court will not enforce specific performance of that which the parties never agreed to. The case does not touch the question, whether an agreement made under mistake of law may not be rescinded ; but decides merely this, that the Court will not make an agreement for the parties, and then order them to execute it.

The Proposed Test Tested.

Suppose that the parties had agreed that as security for the loan some form of instrument which would give the lender *a charge upon the vessels* should be executed, and that in carrying out this agreement "a particular course is taken," viz., a power of attorney is given, "upon deliberation, in preference to another present to the minds of the parties," viz., a mortgage ; is it, under such circumstances, correct to say that "that action so far is final" ? Not at all. The very contrary is the fact. And *Hunt v. Rousmaniere* is our authority for so saying :—"That the general intention of the parties was to provide a security, as effectual as a mortgage of the vessels would be, can admit of no doubt ; and *if such had been their agreement*, the insufficiency of the instruments to effect that object which were afterwards prepared would have furnished a ground for the interposition of a court of equity.

Enquiry after the True Rule.

We now proceed to show that the rules governing relief in equity upon the ground of mistake of fact are also

applicable to mistake of law. And we will consider the subject under the following headings:—

I. MUTUAL MISTAKE OF FACT.

II. MUTUAL MISTAKE OF LAW.

1. In both of these cases land conveyed, or money paid, may be recovered.
2. But if the parties are aware of a doubt as to fact or law, and, nevertheless, make an agreement, they are bound.

III. UNILATERAL MISTAKE OF FACT.

IV. UNILATERAL MISTAKE OF LAW.

In both of these—

1. Land and money are recoverable—

- (a) If the mistake have been caused by fraud or misrepresentation.
- (b) If the other party was under any obligation to disclose the truth.

2. Land and money are alike irrecoverable if there have been no obligation to disclose the truth, and no fraud or imposition.

V. MISTAKE AS TO THE LEGAL EFFECT OF THE TERMS OF AN AGREEMENT.

VI. REVIEW OF SOME OF THE AUTHORITIES.

I. Mutual Mistake of Fact.

If an agreement be made for the sale and purchase of a messuage which, unknown to both parties, had at the time of the agreement been swept away by a flood, equity would relieve the purchaser upon the ground that both parties intended the sale and purchase of a subsisting thing, and implied its existence *as the basis of their contract*. *Hore v. Becher*, 12 Sim. 465; *Cochrane v. Willis*, L. R. 1 Ch. App. 58.

II. Mutual Mistake of Law.

There seems to be no good ground for a different decision where the mutual mistake is one of law. For example:—

If A. purchase his own land from B., both believing as a matter of law that B. is the true owner, equity will relieve. *Bingham v. Bingham*, 1 Ves. Sen. 126; *Cooper v. Phibbs*, L. R. 2 H. L. 149; *Earl Beauchamp v. Winn*, L. R. 6 H. L., 223 & 234.

Under the same heading may be placed *Re Saxon Life Assurance Co.*; *Anchor Case*, 2 J. & H. 408; 1 J. & S. 29; 1 H. & M. 672. In this case Company A. agreed to transfer all its assets to Company B. X. was a creditor of Company A., and all parties believing that the transfer was valid, X. gave up his security as against Company A., taking a new one from Company B. The whole transaction proved to be *ultra vires*, and X. was held to be entitled to be reinstated in his former position upon the ground of mutual mistake.

When there is mutual mistake of law, therefore, as well as where there is mutual mistake of fact, land or money can be recovered, in equity.

2. *Doubtful questions settled by the parties.*

There is a class of cases which seem to form an exception to the generality of these rules. Cases in which there is a mutual mistake of fact or law with reference to the subject matter of the contract, and yet there can be no relief. It is this, that where a party is aware of a doubt as to a fact or as to his rights, and instead of insisting upon the view most beneficial to him agrees to adopt the other view, then he will not be permitted to assert the mistake with a view to relief.

Fact. While the non-existence of a message will nullify a contract based by both parties upon its existence (*ante*), if there be a doubt as to its existence and the purchaser take his chance, and for that pay his money, he can, most certainly, have no relief.

Law. *Rogers v. Ingham*, 3 Ch. Div. 351, affords us a good example of a doubtful question of law settled for ever without a law-suit. It was decided in that case that where a contest had arisen between two legatees as to the true

construction of the will, and, after advice taken, they had agreed to an equal division of the money, that it was not competent for one of them to allege a misconstruction of the will, with a view to the recovery of the portion of the money paid to the other legatee. The decision goes upon the ground of the settlement of doubtful rights. The point was well known, counsel had advised the parties and the settlement was made and acquiesced in by both. The distinction between the cases is this. In *Rogers v. Ingham* both parties were aware of the existence of the doubt and deliberately, after consultation (which put all question as fraud out of consideration), agreed to a settlement. In the other cases the party aggrieved did not agree to any settlement. The point was never thought of. Mr. Bigelow's test, or something nearly like it, would be applicable here.

Turner, L. J., in *Stone v. Godfrey*, 5 D. M. & G. 90, is reported to have said, "*This Court has power (as I feel no doubt that it has) to relieve against mistakes in law as well as against mistakes in fact.* When, however, parties come to this Court to be relieved against the consequences of mistakes in law, it is, I think, the duty of the Court to be satisfied that the conduct of the parties has been determined by those mistakes; otherwise great injustice may be done. Parties may be erroneously advised as to the law, but they may be told on what circumstances the question of law depends, and in what mode it may be tried, and they may determine that (whether the advice which they have received be well or ill founded) they will give up the question in favour of the party with whom it arises." If they do so agree there can be no relief; but if there be no such abandonment, then there may, under certain circumstances, be relief.

See also *Stapilton v. Stapilton*, 1 Atk. 2; *Gibbons v. Gaunt*, 4 Ves. 840; *Stewart v. Stewart*, 6 Cl. & F. 911. *Lansdowne v. Lansdowne*, Mose. 364, must be justified upon the ground of misrepresentation. See the report in 2 J. & W. 205. See the reference in *Stewart v. Stewart*, 6 Cl. & F. 965. So also must *Coward v. Hughes*, 1 K & J. 443.

III. Unilateral Mistake—Of Fact.

(a) Misrepresentation of a material fact, if relied upon, is a ground for rescission.

(b) Non-communication of a material fact is likewise a ground for rescission where there is any obligation to disclose the truth.

(c) It has recently been held (*Paget v. Marshall*, 28 Ch. Div. 255) that where a lessor agreed to lease, and did execute a lease, of certain portions of a building, and afterwards alleged that a part of the building was included by mistake, he never having intended to include it, he was entitled to relief, notwithstanding the fact that the lessee was under no misapprehension, and was in no way responsible for the mistake. The peculiar circumstances of the case and the ambiguity of the judgment render it of less importance as a precedent—a precedent for a doctrine unsupported, as far as we know, by any other case. See *Bentley v. Mackay*, 4 D. F. & J. 285; *Mackenzie v. Coulson*, L. R. 8 Eq. 368; *Campbell v. Edwards*, 24 Gr. 152.

IV. Unilateral Mistake—Of Law.

And the rule seems to be the same in the case of a unilateral mistake of law.

(a) Misrepresentation.

(a) Upon this point we cannot do better than adopt the language of Mr. Crosby Johnson, in 18 Cen. L. J. 9. "One universally recognized exception to the general rule is, where the party seeking relief from a mistake of law, was misled as to the law of the transaction, by the false statements of the other party. As a court of equity will not permit a party to profit by his own wrong-doing, nor to obtain a reward as the result of his fraudulent practices, it will allow relief against a mistake which is so brought about; nor is the granting of relief in such cases a violation of the rule, as the fraud furnishes adequate ground for interposing independently of the alleged mistake of law. *Berry v. Whitney*, 40 Mich. 65; *Bales v. Hunt*, 77 Ind. 355; *Mason v. Pelletier*, 82 N. C. 40;

Jenkins v. German, 58 Ga. 125; *Hardigrave v. Mitchner*, 51 Ala. 151; *Montgomery v. Stockley*, 37 Iowa, 107; *Bay-ore v. Ins. Co.*, 4 Daly, 246.

(b) *Non-Communication.*

It will be observed that we have not said (as is usual with the text writers) that non-communication will vitiate where there is any relation of trust or confidence between the parties. This is too narrow. It should be as wide as we have given it, "where the other party is under any obligation to disclose the truth." This includes not only cases of trustee and *cestui qui trust*, solicitor and client, and so on; but also cases where one person knowing that another owes him nothing, nevertheless takes his money. This may be placed under the head of failure of consideration, but we think it is more properly classified as we here present it.

Broughton v. Hutt, 3 DeG. & J. 500, was a case in which the principle is well brought out. In that case the plaintiff believing himself, as heir-at-law of a shareholder in a company, to be liable for the unpaid calls, executed a deed of indemnity to the trustees. The trustees were aware that it was the executor, and not the heir-at-law, that was liable, and it was held that inasmuch as "*they ought not to have allowed him to sign the deed without apprising him of the fact*," the deed ought to be cancelled.

2. *Land and money irrecoverable if no obligation to disclose, and no fraud.*

(a) *Mistake of fact.* The purchaser of land, aware of the existence of a valuable mine upon the property, is under no obligation (apart from any other relationship between the parties) to disclose the fact; and the vendor's ignorance will form no ground for rescission.

(b) *Mistake of law.* To the same rule should be referred a large number of cases usually cited for the proposition that relief will not be given upon the ground of mistake of law. Many of these are cited below under the heading of "Review of some of the Authorities."

V. Mistake as to the legal effect of the terms of an Agreement.

1. *Mutual mistake.* It would be strange indeed, if both parties admitting the mistake, one could nevertheless insist upon the true legal effect of an instrument; and of course the law would be the same, whether one of the parties admitted it or not, if the fact were proved. See *Forbes v. Watt*, L. R. 2 Sc. & D. 214; *Pollock on Contracts*, 418. The case of *Midland G. W. R. Co. v. Johnson*, 6 H. L. Co. 798. at p. 811, is not opposed to this. All that is there said is, "It seems, however, to me quite impossible to found an equity upon the ground of mutual mistake, to the extent of making a different contract from the one agreed to by the parties."

2. *Unilateral mistake.* "The construction of a contract is clearly matter of law; and if a party acts upon a mistaken view of his rights under a contract, he is no more entitled to relief in equity than he would be in law." *Per Lord Chelmsford in Midland G. W. Ry. v. Johnson*, 6 H. L. Ca. p. 810. And it has been held to be no answer to a bill for specific performance, that the defendant misunderstood the legal effect of an agreement. *Powell v. Smith*, L. R. 14 Eq. 85. On the other hand, it has been held that "the Court will receive parol evidence to rectify a written instrument, notwithstanding the language used was that intended by the parties, where the legal effect of such language is different from what was the intention and agreement of the parties." *Merritt v. Ives*, 2 U. C. O. S. 25. And in *Wycombe Ry. Co. v. Donnington Hospital*, L. R. 1 Ch. App. 273, the decree refusing specific performance was expressly put upon the ground that it is "contrary to the principles and practice of this Court" to decree specific performance of an agreement "where one of the parties to a contract understood the agreement in a different sense to the other." Specific performance being always discretionary with the Court, there would seem to be good ground for refusing a decree where the defendant proves that he was under a misappre-

hension. But the question remains,—Will the Court rescind an agreement where one of the parties is in error? With deference we would place this under a previous heading, and say that relief will be granted only where there is, (a) some fraud or misrepresentation, or (b) some non-disclosure or non-enlightenment under circumstances in which the Court holds that silence amounted to fraud.

VI. Review of some of the Authorities.

We now proceed to an examination of some of the cases most frequently cited in connection with the subject, and which are supposed to uphold the distinction between mistake of law and of fact.

In *Brisbane v. Dacres*, 5 Taunt. 143, the captain of a King's ship brought home in her, public treasure upon the public service, and treasure of individuals for his own emolument. He received freight for both, and paid over one-third of it, according to an established usage in the navy, to the admiral under whose command he sailed. Discovering, however, that the law did not compel captains to pay to admirals one-third of the freight, the captain brought an action for money had and received, to recover it back from the admiral's executrix; and it was held that he could not recover back the private freight, because the whole of that transaction was illegal; nor the public freight, because he had paid it with full knowledge of the facts, although in ignorance of the law, and *because it was not against conscience for the executrix to retain it*. "If we were to hold otherwise," said Gibb, J., "I think many inconveniences may arise; there are many doubtful questions of law; when they arise, the defendant has an option, either to litigate the question, or to submit to the demand, and pay the money." This case, therefore, is one of a doubtful question of law settled by the acts of the parties; a case similar to *Rogers v. Ingham* (*ante*), and contravenes in no way our proposition.

Higgs v. Scott, 7 C. B. 63, was decided upon the same principle. There A., tenant to B., received notice from C., a mortgagee of B.'s term, that the interest was in arrear,

and requiring payment to her (C.) of the rent then due. A., notwithstanding this notice, paid the rent to B., and was afterwards compelled, by distress, to pay the amount over again to C. *Held*, that the money having been paid to B. with full knowledge of the facts, could not be recovered back. "It was not against conscience" for B. to retain the money.

In *Bilby v. Lumley*, 2 *East*, 470, an underwriter having paid the loss, sought to recover the amount paid, on the ground that a material circumstance had been concealed at the time of the contract. It appearing, however, that he knew of this fact at the time of the adjustment, it was held that he could not recover. This case forms as good an example as we could wish for the application of our principle. It is said, if the underwriter had been ignorant of the *fact* at the time of the adjustment, he might have recovered. But having known the facts, and being ignorant only of the law, he was defeated. There seems to be some ground here for saying, *Ignorantia facti excusat; ignorantia juris non excusat*. But, on reflection, all the case decides is, that where an underwriter has been misled in issuing the policy, and, after full knowledge of the fraud, pays the money, he cannot recover it again. And if it be answered, that the underwriter did not know that *by law* he was relieved from payment, the reply is, not that every one is assumed to know the law, but that the other party was in no way responsible for the ignorance. In other words, it is a case of unilateral mistake, not caused by the other party; and if it had been a mistake of fact under the same circumstances there would have similarly been no relief.

In *Freeman v. Jeffries*, *L. R. 4 Ex. p. 197*, Kelly, C. B., puts the following hypothetical cases, which are useful by way of further illustration: "If A. pay money to B., supposing him to be the agent of C., to whom he owes the money, and B. be not the agent, it may be recovered back again." In this case the mistake may be one of law, as in the interpretation of a power of attorney; or of fact, as to whether there ever was a power of attorney. In both cases

the money can be recovered. For the mistake in both may be mutual, and if unilateral it would be clearly within *Broughton v. Hutt*, 3 *De G. & J.* 500, for B. was clearly bound to apprise A. both of law and fact—clearly bound not to take money to which he knew he had no title. The other case put by Kelly, C. B., is this: "If A. and B. are settling an account, and make a mistake in running up the items, A. pays B. 100*l.* too much, he may recover it again." Certainly, for it is a case of mutual mistake of fact. If they both were aware of all the facts, but as to one item they disputed upon the law, and A. paid the amount when he need not have done so, would he be similarly entitled to relief? Not similarly, because the cases are dissimilar. If the mistake was a mutual one, but if A., notwithstanding the doubt, chose to pay, he has settled the matter. If it were unilateral then A. can recover only if there have been some ground of fraud or improper concealment.

In *Harman v. Coen*, 4 *Vin. Abr.* 387, *pl.* 3, two were jointly bound by a bond, and the obligee releases one, supposing, erroneously, that the other will remain bound, the obligee will not be relieved upon the mere ground of his mistake of the law, for *ignorantia juris non excusat*. And if the release had been given upon the erroneous presumption that the other obligee was dead—a mistake of fact—could relief have been granted? Not at all, unless the releasee was in some way responsible for the mistake. And in such case relief would likewise have been given in respect of the mistake of law.

We think that we may now safely desist. Our proposition and arguments are sufficiently indicated. Whether they are entirely wrong is a matter of law, from which we will be entitled to no relief, for we believe it to be unilateral and not brought about by fraud, misrepresentation or concealment; unless, perhaps, editors are exceptions to every rule.

THE RIEL CASE.

THE points determined in this and the *Connor's case*,
2 *Man. L. R.*, may be summarized as follows :—

1. A stipendiary magistrate and a justice of the peace, with the intervention of a jury of six, may try any charge of murder or treason in the North West Territories.
2. The information may be laid before a stipendiary magistrate alone. An associate justice of the peace is necessary for the trial only.
3. Except for the purpose of arrest, it is not necessary that there should be an information at all; nor need the trial be based upon an indictment by a grand jury, or a coroner's inquisition. All that is necessary is a charge, and this need not be under oath.
4. The evidence may be taken in short-hand.
5. Writs of *certiorari* and *habeas corpus* cannot be issued by the Court of Queen's Bench in Manitoba to bring up the papers and prisoner upon an appeal to that Court.
6. The Court of Queen's Bench will hear an appeal in the absence of the prisoner.

EDITORIAL NOTES.

Circuits.

The Autumn Circuits have been arranged as follows :—
Eastern.—The Chief Justice, commencing 10th November.
Central.—Mr. Justice Dubuc, commencing 3rd November.
Western.—Mr. Justice Killam, commencing 10th November.

An Incident in Queen v. Riel.

Counsel: "No record is ever made up in criminal cases unless wanted for ulterior purposes."

The Chief Justice: "The only note of the sentence, even in murder cases, is that entered upon the indictment by the clerk—*Sus. pen. col.*"

Mr. Justice Taylor: And sometimes only *S. P. C.*"

Counsel: "*P. P. C.* I suppose would answer all the purpose."

The Master of the Rolls.

The Right Hon. Sir William Baliol Brett has been raised to the Peerage, and will be known in future as Baron Esher. He was born August 13, 1817, and is therefore 68 years of age. He was called to the bar at Lincoln's Inn, in Hilary Term, 1846; was M. P. for Helston from 1866 to 1868; appointed Solicitor General in 1868; was a Justice of the Court of Common Pleas from 1868 to 1875, and of the Common Pleas Division of the High Court of Justice from 1875 to 1876: was Lord Chief Justice of Appeal from 1876 to 1883; and has been Master of the Rolls since 1883. We agree with *The Law Journal* (Eng.) in saying that "the creation not only bestows a well-earned distinction, but secures to the public in the future the services, in the highest court in the country of one of its ablest lawyers."

The Statutes.

The *Law Journal* (Eng.) is very angry because of the long delay in the appearance of the Statutes of the last British Parliament. If in Manitoba the Queen's printer should, by any chance, happen to accomplish that which the same functionary in England is traduced for failing to achieve, he would, no doubt, receive instant dismissal for excessive promptitude and consequent breach of all tradition.

Notice the dates: "The usual complaint at the end of the session of the lateness of the appearance of Queen's printer's copies of Acts of Parliament must be made again

with additional force this year. Most of the Acts which obtained the royal assent on the 6th inst. were not obtainable until the 14th following, and the Acts assented to on the 14th were not to be had till the 17th. There is no excuse, &c."

English practitioners have our most hearty sympathy. It is really dreadful to be kept out of the statutes for three days. When it lasts for four months one becomes hardened and can practice with as much confidence as if one had not only seen but read and studied the last volume of legislation. But in the three-day stage the suffering must be intense. They should come out west where things are done properly.

REVIEWS.

HAWKINS ON WILLS.—We have received from T. & J. W. Johnson & Co., Philadelphia, a copy of the 2nd American edition of this important work. The original design of the book, a design admirably executed by the author, appears from his preface :—"The present work is intended to embrace all the questions of testamentary law on which rules of construction exist. It seems to have been thought by some that a rule ought to exist upon every possible point of construction ; but the tendency of the courts now is to avoid creating (except in minor matters) any fresh rules, and not to extend the older rules beyond their present limits. If this principle be acted on, the law *necessary to be known* for purposes of construction may be reduced within moderate dimensions, and the present treatise is designed to show (however imperfectly) the form in which it might be permanently retained."

The present edition contains references, not only to the American editions, but also, we are glad to notice, to the more important of the Canadian cases. The Law Society has already procured a copy of the edition, and we can safely recommend it to the profession.

THE MANITOBA LAW JOURNAL.

VOL. II.

NOVEMBER, 1885.

No. 11.

CONTRIBUTORY NEGLIGENCE.

ON whom does the *onus* of proving the existence, or absence of, contributory negligence lie?

"There are two things for him (the plaintiff) to establish, one is affirmative, and the other negative. It is for the plaintiff to shew that the accident which happened to him was caused by a negligent act of the defendants, or of those for whose negligent acts the defendants are liable, and that that accident was produced as between him and the defendants solely by the defendants' negligence in this sense, that he himself was not guilty of any negligence which contributed to the accident; because even though the defendants were guilty of negligence which contributed to the accident, yet if the plaintiff also was guilty of negligence which contributed to the accident, so that the accident was the result of the joint negligence of the plaintiff and of the defendants, then the plaintiff cannot recover; it being understood that, if the defendants' servants could by reasonable care have avoided injuring the plaintiff, although he was negligent, then the negligence of the plaintiff would not contribute to the accident." *Per Brett. M. R., in Davey v. London and South Western Ry. Co. 12 Q. B. Div. 70 (1883).*

This language is clear enough, and it is the holding of the Court of Appeal in England. Is it law?

Although the point was not directly in issue in *Dublin, Wicklow and Wexford Ry. Co. v. Slattery*, 3 App. Ca. 1155 (1878), the opinions of several eminent judges may be found there. Lord Hatherly said: "It appears that the course in Ireland is to raise such a case by a plea, but the form in which it is raised can make no difference in the substance of the case. Whether introduced under the plea of 'not guilty,' or by a special plea, such a defence must be proved *by the party asserting it*." Lord Penzance said: "I entirely fail to see how the shifting of the *onus* or burthen of proof in the course of the trial can alter the issue itself, *which is an affirmative, and not a negative one*. . . . Whether the plaintiff gives any evidence or not, the affirmative of the issue in question is none the less ultimately upon *the defendant*, and he must satisfy the jury, and not the judge, that the evidence has established it." Lord Blackburn said: "If in the present case no evidence at all had been given to shew that there was neglect of duty in the deceased occasioning the accident, no doubt it must have been taken that there was no such neglect of duty. So far the *onus* was at the beginning of the trial on the *defendants*." Lord Coleridge agrees that "there are two things for him (the plaintiff) to establish," but his catalogue is not the same as that of the Master of the Rolls in the Davey case:—"There must be evidence of negligence on the part of the defendants, and also that the negligence in fact caused the injury complained of. . . . The plaintiff fails, if he fails to shew that the defendants caused the wrong, and he does so fail, if he shews that he caused it, or that the deceased caused it himself. . . . The . . . plaintiff may fail . . . to prove his cause of action, by proving his own negligence, as well as by not proving the negligence of the defendant. It is, therefore, I think the duty of the judge to withdraw the case from the jury if by the plaintiff's own evidence, at the end of the plaintiff's case, or by the unanswered and undisputed evidence on both sides, at the end of the whole case, it is proved, either that there was no negligence of the defendants which caused the injury, or that there was negligence of the plaintiff which did."

Let us put the holdings of the Master of the Rolls and the Chief Justice together for comparison.

The plaintiff is bound to prove—

As per the Master of the Rolls :

1. That the accident was caused by a negligent act of the defendants.
2. And that he himself was not guilty of any negligence which contributed to the accident.

As per the Chief Justice :

1. That there was negligence on the part of the defendant.
2. And that the negligence in fact caused the injury.

The Chief Justice therefore divides the first requirement of the Master of the Rolls into two, and omits the second.

In many cases the distinction is unimportant ; for it being admitted that the plaintiff must show that the accident was caused by the defendant's negligence, it lies upon him to detail all the circumstances of the accident, and in doing so he necessarily describes his own actions. In other words, usually a plaintiff cannot prove that the defendant's negligence *caused* the accident—was the effective cause of it—which he must do, without, at the same time, showing his own carefulness.

This is a different thing, however, from saying that in all cases the plaintiff must prove the propriety of his own conduct. He is not bound to prove affirmatively, for instance, that he looked up and down the railway track to see if the train which ran over him was coming (though if he did not this would constitute contributory negligence) ; for if such were the law, and the man, instead of being wounded, were killed, his executors could, in all probability, never prove their case. See *Peart v. Grand Trunk Ry. Co.* 10 Ont. App. R. 191.

We submit, therefore, that the opinion of the Chief Justice is correct.

Under what circumstances contributory negligence is a good defence has been discussed in *Siner v. G. W. Ry.* L. R. 4 Ex. 119 (largely overruled), *Robson v. North Eastern Ry. Co.*, 2 Q. B. Div. 85; *Rose v. North Eastern Ry.* 2 Ex. Div.; *Jackson v. The Metropolitan Ry. Co.* L. R. 3 App. Ca. 197, *Haldane v. Great Western Ry. Co.* 30 U. C. 97; *Jones v. Grand Trunk Ry. Co.*, 45 U. C. 198; *Edgar v. Northern Ry. Co.* 4 Ont. R. 201; *Bliss v Boeckh*, 8 Ont. R. 451; and in the cases above noted.

THE LAW REPORTS.

UNDER the present regulations of the Law Society the Editor of the LAW REPORTS is restricted to 32 pages per month. The consequence is that the reporting is falling very much in arrear, and that the profession is deprived of the advantage of a prompt perusal of many valuable judgments. We would recommend the Law Society to remove all limitation—to require that all cases worth reporting should be reported, and reported without delay.

That the delay may be the less prejudicial we give below a synopsis of the points determined during the last Term. The reports, unless some new arrangement be made, cannot be published for three months to come.

PARENTEAU v. HARRIS. *Husband and wife.—Execution.—Purchaser for value without notice.* A husband and wife owned adjoining farms. That of the wife was worked entirely by the husband; his horses and implements being used for the purpose, and the wife in no way interfered, or took part, in it. The seed grain had been paid for partly by the husband and partly by the wife. A man employed at

the threshing said he threshed for the husband—"I was to be paid by the one who employed me." Other threshers were paid by the husband's labor. *Held*, that the grain was the property of the husband.

Upon the evidence it was held that a purchaser of the grain had notice of the existence of an execution, and took, therefore, subject to it.

JONES v. HENDERSON. *Company.—Powers of Manager.—Prima facie* it is not within the power of a manager of a company engaged in the manufacture of farming implements to pledge the goods or assets of the company to a creditor of the company.

MILLER v. HENRY (C. L.) *Order to examine party residing abroad.* (1) A party to an action resident abroad may be ordered to attend and be examined upon the pleadings. (2) It is in the discretion of the judge whether to make the order *ex parte* or upon summons. (3) A copy of the order must be served upon the opposite attorney, otherwise attendance cannot be enforced. Service upon a firm of attorneys resident abroad having no instructions to receive service is not sufficient.

YOUNG v. SHORT. *Invalid chattel mortgage.—Possession after fi. fas. but before seizure.* After a defective chattel mortgage had been made to the plaintiff, the defendant placed an execution against the mortgagor in the sheriff's hands. Before actual seizure the mortgagee took possession. *Held*, that he was not a person who had acquired "the title to such goods . . . bona fide, and for valuable consideration" without notice of the writ, within 19 & 20 Vic. c. 97.

The Act 46 & 47 Vic. c. 30 is not retrospective.

SHARPE v. MCBURNIE. *Counter-claim.—"Breaking."* A claim not arising and matured before the issue of the writ cannot be set up by way of set-off or counter-claim. Such a plea should show that the claim asserted had so matured, (Overruling Taylor, J.) Dubuc, J., *diss.*

"Breaking" land in a contract does not include back-setting.

ANLY v. HOLY TRINITY CHURCH. *Mechanic's Lien Act.*—*Sub-contractor.*—*Equitable assignment by contractor.* Until a lien under the Act has been acquired by a sub-contractor, the contractor may give an equitable assignment of the contract price. In such case the sub-contractor can recover nothing from the owner of the land.

BRAUN v. HUGHES. *Sale of land.*—*Rescission by one of several joint purchasers.* Five persons, of whom the plaintiff was one, jointly purchased land from the defendants. On a bill to set aside the purchase upon the ground of fraud, *Held*, that the sale could not be rescinded in part, and that the plaintiff's only remedy was by deceit.

The court refused to allow the plaintiff to procure a conveyance from the other purchasers, and thus rescind the whole sale; such other purchasers not being parties to the suit.

RANKIN v. MCKENZIE. *Joint covenant.*—*Liability of executors of deceased covenantor.* "The mortgagors do hereby for themselves, their heirs, executors and administrators, covenant, promise and agree, to and with the said mortgagee, his heirs and assigns, in manner following, that is to say, that the said mortgagors, their heirs, executors, administrators, or some or one of them, shall and will, well and truly pay or cause to be paid," &c., is a joint covenant.

The cases in which joint covenants will be held to be joint and several discussed.

RE BANNERMAN. *Real Property Act of 1885.*—*Probate.* Before executors can apply for registration as owners of the defendant's land they must prove the will in Surrogate Court.

RE IRISH. *"Real Property Act of 1885."*—*Unpatented lands.* (1) By section 28 lands "when alienated" by the Crown, "shall be subject to the provisions of this Act." The word "alienated" means completely alienated—that is

by patent. (2) Lands unalienated, by patent, on the 1st July, 1885, remain under the old law until brought under the provisions of the Act. (3) Lands brought under the Act become chattels real for the purpose of devolution at death, but are lands in other respects, and are not exigible under *fi. fa.* goods. (4) A person entitled to a patent for a homestead, or pre-emption, having received a certificate of recommendation for patent, countersigned by the Commissioner of Dominion Lands, may bring such lands under the operation of the "Real Property Act, 1885." *Taylor, J., diss.* (5) After application under the Act no deeds can be registered in the county registry offices. (6) Conveyances of lands, patented after the 1st July, 1885, in the statutory short form may be treated as substantially in conformity with the forms given in the Act.

CANADA P. L. & S. CO. v. THE MERCHANTS BANK.
Fixtures. Articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the *onus* of shewing that they were so intended lying on those who assert that they have ceased to be chattels.

A machine complete in itself, unattached to the realty, but receiving motive power by a belt or pipe from some other machine does not lose its character as a chattel merely because it is used in a building, where a manufacture for which the machine was adapted, is carried on.

PLUMMER WAGGON CO. v. WILSON *Law Stamps.* A jury notice was filed without the usual \$12 in stamps being affixed. *Held*, regular, as the Act relating to stamps is *ultra vires*.

THE BRADLAUGH CASES.

MR. BRADLAUGH has the Court of Appeal against him again. *Attorney-General v. Bradlaugh*, 14 Q. B. Div. 667. It was against him before in *Clarke v Bradlaugh*, 7 Q. B. Div. 38, but the House of Lords reversed the decision, and Mr. B. will probably endeavour to procure the House to repeat the operation.

How simple a thing it is to start a long course of difficult and expensive litigation. After Mr. B.'s election for Northampton in the spring of 1880, upon entering the House of Commons, he claimed to be allowed to take an affirmation instead of the usual oath. Afterwards he expressed his willingness to take the oath, and it was referred to a select committee to consider whether the House had any right to prevent him so doing. Various other proceedings were taken and ultimately he was expelled and a new writ issued. If he had taken the oath in the first place there would have been no difficulty, but claiming the right to affirm, and then abandoning it, brought in its train all that followed—a small enough cause for so much effect.

After his re-election, while the House was in session, Mr. B., accompanied by two members, approached the table. Mr. Speaker rose and called "Order, order;" but Mr. B., directly he reached the table, proceeded to read the oath from a paper which he held in his hand, kissed a New Testament which he had brought with him, subscribed the paper, and left it upon the table, together with the certificate of his return. On the same day he took part in three divisions in the House; and, this being done, the question whether he had forfeited the penalties prescribed by the statute for sitting and voting without having taken and subscribed the oath, was in fair shape for trial in the courts.

Upon a subsequent occasion Mr. B. again voted in a division of the House, and upon the same day a writ was issued against him by one Clarke, claiming the penalties. The old point, as to the division of a day, was at once suggested; and the statement of claim was demurred to upon the ground that, as a writ is supposed to issue at the earliest moment of the day of its date, it had issued before the offences complained of. Mr. B. failed in his demurrer, *7 Q. B. Div. 151*; and in the Court of Appeal he fared no better, *8 Q. B. Div. 63*.

Clarke only survived this difficulty to meet one more serious. It was said that "when a penalty is created by statute, and nothing is said as to who may recover it, and it is not created for the benefit of a party grieved, and the offence is not against an individual, it belongs to the Crown, and the Crown alone can maintain a suit for it." Mr. Justice Matthew thought that this proposition was unsound, and the Court of Appeal agreed with him (*7 Q. B. Div. 38*), but the House of Lords reversed the decision (*8 App. Ca. 354*) and this terminated the action in Mr. B.'s favor.

It only established, however, that the Attorney-General, and not a common informer, must be plaintiff, and an information was forthwith filed. In this the real points in controversy were tried at bar in the Queen's Bench Division, when a verdict was entered against the defendant. The stability of that verdict has been upheld by the Court of Appeal.

The principal question decided is as to the religious belief necessary to the taking of an oath. The Master of the Rolls disposes of it by citing the old decision in *Ornichund v. Baker*, *1 Atk. 21*, where Miles, C. J., said, "I am of opinion that such infidels as believe in a God, and that He will punish them if they swear falsely, may and ought to be admitted as witnesses in this, though a Christian country. And on the other hand, I am clearly of opinion that such infidels (if any such there be) who either do not believe in a God, or if they do, do not think that He will either reward

or punish them in this world or the next, cannot be witnesses in any case, nor under any circumstances." The jury had found that Mr. B. had no belief in a Supreme Being, and was a person upon whose conscience an oath, as an oath, had no binding force. And it was, therefore, held that although he "may have taken something which binds him according to his own feelings . . . that is not what the Act of Parliament requires. It requires an oath; and he has not taken an oath."

If this reasoning be permitted it will have a far-reaching effect. It will be observed that the point of the decision is this:—Admit for the purposes of argument, that a member of Parliament, observing all the proper formalities, has assumed to take the usual oath, and no one has for months questioned his right to vote, he may, nevertheless, be sued for the penalties and be mulcted if it can be shown that his religious belief was defective. The decision is well calculated to add a new terror to indulgence in political life. There are, probably, a good many members of the British House of Commons who could not successfully defend themselves in such an action. It involves this also, that a witness in any case may take an oath, swear falsely, and escape conviction for perjury if he can show that his belief was not up to the legal standard.

If this were the only point in the case we should expect to see it reversed in the House of Lords. On the other ground, however, that the rules of the House did not permit the taking of the oath in the manner adopted, the decision may probably be upheld. It would be clearly insufficient for a member to stand up in his place, while other business was proceeding, and after mumbling some words to say that he had taken the oath. And in the present case the proceedings were equally informal.

SECOND ACTION FOR NEW DAMAGE.

IT is plain law that for one cause, there can be but one action; but, although that statement seems to want nothing in clearness, difficulty often arises in its application.

In case of an assault there can be but one recovery of damage, although in after years a disease, theretofore unsuspected, is developed from the injuries. Here there is a well defined cause of action settled by a judgment; and no further damages can be sought.

The question seems, however, not always to be so easy for solution. A recent case in England, *Mitchell v. Darnley Main Colliery Co.*, 52 L. T. N. S. 675, illustrates the difficulty upon which learned judges have differed.

The owner of a mine by excavation causes a subsidence of the soil which is owned by another; damage for the subsidence is recovered and paid; and subsequently a further subsidence takes place. In such case can a new action be brought for the new damage? The mine-owner has done no new act. The second subsidence seems to be a development of the damage at first done, just as the disease in the assault case. But although it appears at first sight to be strictly analogous, it in reality is not so.

Let us take another case by way of illustration. Let us suppose that a drain is constructed which has the effect of improperly throwing water upon an adjoining owner. It is plain that for the mere construction of the drain no action will lie. A man has a right to build as many drains upon his own property as he likes, provided he does not permit them to become a nuisance to his neighbours. After the first flood an action is brought and damages recovered and paid. During the next year a similar flood occurs. And now the question arises,—Can a second action be brought? The answer seems to be sufficiently easy. Of course it can.

And yet the defendant has done no new act. He has, however, omitted to do something. The second flooding is the result of *not removing* the drain. And for every subsequent flood a new action can be brought.

To return to *Mitchell v. Darnley Main Colliery Co.* Is it analogous to the assault case, in which the new damage, the disease, cannot be sued for, or to the drain case in which it can? Undoubtedly, we think, to the latter. No action could be brought for the mere excavation. The mine-owner could excavate as much as he liked, provided he did no damage to the owner of the soil. Until a subsidence took place there could be no action at all, for no damage had accrued, and the mine-owner might at any time put in supports and prevent the happening of any damage at all. After a subsidence an action may be brought for the *subsidence*, not for the *excavation*. In this action it would be just as impossible to recover for an anticipated further subsidence, which might be prevented by the defendant shoring up the soil, as in the drain case to recover for subsequent years of floods, which might also be prevented by the removal of the drain. And so it has at last been decided, but not without overruling. *Lamb v. Walker*, 3 Q. B. Div. 389; and *Nicklin v. Williams*, 10 Ex. 259.

INTEREST REIPUBLICÆ UT SIT FINIS LITIIUM.

ANOTHER well-worn belief—another legal axiom—has been thrown open to discussion. If A. sues B. and, after a hard-fought contest, succeeds, can B. in a subsequent action avoid estoppel by pleading that the judgment was obtained by perjury or fraud?

If A. sues B. for goods sold and delivered, and B. being unable to find his receipt is beaten, it is clear law that he has no remedy, if the time for obtaining a new trial is passed. This was so held in the leading case of *Marriott v. Hampton*, 2 Sm. L. C. (8th Ed.) 421.

Even where there has been no trial in the action, but a writ has been issued, money paid even under protest cannot be recovered. Although in this case the element of fraud may sometimes alter the general rule. *Brown v. McKinally*, 1 Esp. 279; *Hamlet v. Richardson*, 9 Bing. 644; *Milnes v. Duncan*, 6 B. & C. 679.

In *Flower v. Lloyd*, 10 Ch. Div. 327, the plaintiff sought to have what he alleged to have been a fraudulent judgment set aside. The plaintiffs had brought an action against the defendants to restrain infringements of a patent process for printing on metal plates. Under an order of the court an expert appointed by the plaintiffs was permitted to inspect the defendants' work, the defendants undertaking to show him the whole process. Upon the evidence thus acquired the plaintiffs were defeated in the action. It was afterwards alleged that the expert had been deceived by the defendants, and an attempt was made upon this ground to impeach the judgment. The proof failed, but the Lord Justice Baggallay said, "Whilst I am fully sensible of the evils and inconveniences which must arise from re-opening what are apparently final judgments between litigant parties, I desire to reserve for myself an opportunity of fully considering

the question, how, having regard to general principles and authority, it will be proper to deal with cases, if and when any such arise, in which it shall be clearly proved that a judgment has been obtained by the fraud of one of the parties, which judgment, but for such fraud, would have been in favor of the other party. I should much regret to feel myself compelled to hold that the court had no power to deprive the successful but fraudulent party of the advantages to be derived from what he had so obtained by fraud." The Lord Justice James, speaking for the Lord Justice Thesiger as well as himself, relies upon the old maxim, the caption of this article: "Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogations, or a misleading production of documents, or of a machine, or of a process, had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on the one side or other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favor, the present defendants in their turn might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury; and so the parties might go on alternately *ad infinitum*. . . . Perjuries, falsehoods, frauds, when detected, must be punished and punished severely; but in their desire to prevent parties litigant from obtaining any benefit from such foul means, the court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils, not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods and frauds."

This reasoning seems to us unanswerable, but the doubt having been raised it is not long in being made use of. In *Stewart v. Sutton*, 8 Ont. R. 341, the point came up on demurrer and should, we think, have been settled one way

or another by the judge who heard the argument. He took, however, the extraordinary course of refusing to decide the point, directing the parties to go to trial and see whether the facts as alleged were true, before deciding whether their truth or falsity made any difference in the case.

LAW STAMPS.

OUR court, following the decision of the Privy Council in *Attorney General v. Reed*, has held that the Act relating to law stamps is *ultra vires*. The officials at the court house, however, acting under the direction of the government, refuse to recognize the validity of the decision. In other words, the officers of a court refuse to act upon the law laid down by the same court, confirmed by the Supreme Court and the Privy Council; and the government not only sanctions the proceeding but directs it. The officials excuse themselves on the ground that, if they act as they should, they will be dismissed from office. And the excuse of the government, we suppose, is that they must have revenue. The latter apology would justify burglary. The former is an insult to the government itself.

EDITORIAL NOTES.

Queen's Counsel.

The Hon. C. E. Hamilton, and Mr. N. F. Hagel, have been added to the list of Her Majesty's Counsel. Large numbers in Ontario have also been added; and in many cases are for the first time entitled to say that they are "learned in the law." Many of them have never been seen in court—at all events not since the time, many years ago now, when they agreed to accept the inevitable and sit in their offices; and the great majority never received a brief, unless at their own attorney-hands. No one knew of their ability, as advocates, not even themselves, until Her Majesty declared it.

On the whole, however, we welcome the list and only wish it were larger—that it embraced the whole profession—and then there would probably be an end of the farce. "Whom the gods destroy they first make—numerous." Let them be numerous!

Dialogue between Lawyer and Client.

Who taught me first to litigate,
My neighbour and my brother hate,
And my own rights to overrate?
My lawyer.

Who cleaned my bank account all out,
And brought my solvency in doubt,
Then turned me to the right-about?
My lawyer.

ANSWER.

Who lied to me about his case,
And said we'd have an easy race,
And did it all with solemn face?
My client.

Who took my services for naught,
And did not pay me when he ought,
And boasted what a trick he'd wrought?
My client.

Albany L. J.

THE
MANITOBA LAW JOURNAL.

VOL. II.

DECEMBER, 1885.

No. 12.

RECENT AMERICAN DECISIONS.

Supreme Court of Ohio.

ST. CLAIR STREET RAILWAY CO. *v.* EADIE.

A minor child, who being *sui juris* as to a reasonable care of her person and safety, lawfully and properly enters into a conveyance driven by her parent, and without fault on her part is injured by the negligence of the driver of another vehicle, is not prevented from recovering damages against the proprietor of the latter vehicle, because her parent has by his negligence contributed to the injury.

Transfer Co. v. Kelly, 36 Ohio St. 86, followed. *Thorogood v. Bryan*, 8 C. B. 115, disapproved.

ERROR to the District Court of Cuyahoga County.

This was an action for damages for an injury alleged to have been caused by defendants' negligence. The plaintiff was a minor, aged sixteen years, and was fully capable of taking reasonable care of herself. She was lawfully riding with her father, who was driving his own wagon, when she was injured by a collision between the wagon and a street-car, caused by the mutual and concurring negligence of a street-car driver and her father, but without any fault or negligence on her part. The court below held that the negligence of her father was not to be imputed or attributed

to her, and did not bar a recovery against the street-car company, whose negligence directly contributed to the injury. The street-car company took this writ of error.

The opinion of the court was delivered by

JOHNSON, J.—The plaintiff, though a minor, was sixteen years old, and was, therefore, *sui juris*. She was fully capable of taking care of herself. Had her negligence or misconduct contributed to her injury, she could not recover, though the company was also guilty. The question fairly presented, therefore, is, whether a minor child, who being *sui juris* as to a reasonable care of her person and safety, lawfully and properly enters into a conveyance with her parent, and without fault on her part is injured by the negligence of a street railway company, is prevented from recovering against such negligent company because her parent has, by his negligence, contributed to the injury. In *Transfer Co. v. Kelly*, 36 Ohio, St. 86, this court held that the concurrent negligence of a street-car company, whose passenger the plaintiff was, with that of a transfer company, whereby there was a collision between the wagon of the latter with the car of the former, cannot be imputed to the passenger, so as to charge him with contributory negligence. In that case, as in this, the plaintiff was not in fault; but there, as here, it was contended that the plaintiff was so identified with, or related to, the railroad company by the contract of carriage that the fault of the carrier must be imputed to the passenger. Neither in that case nor in this was there any fault alleged against plaintiff for becoming a passenger. The two cases differ in two respects only. There the carriage was by a public carrier, presumably for hire or reward, while here it was by private conveyance, and presumably gratuitous. There the driver of the street-car was a stranger to the passenger, while here he was her father, with whom she was riding home. In that case it was held that the driver in the street-car was in no just sense the agent or servant of the passenger. If the driver had been under the control of the passenger, then it was said there might be some show of reason for holding

the passenger liable for the negligence of the driver. But as there was no such power of direction or control, the negligence of the driver of the car could not be imputed to the passenger. That was held to be a case of joint negligence of the railroad company and the transfer company, for which they might be sued jointly or severally.

After a thorough examination of the numerous and conflicting authorities upon this point, some of which are cited in the opinion, we then declined to follow the case of *Thoroughgood v. Bryan*, 8 C.B. 115, and other like cases, which holds the passenger liable for the contributory negligence of his driver, where there was mutual fault of two drivers causing an injury, and, as before stated, held that upon principle, as well as upon the better authorities, the passenger was not so identified with the vehicle in which he was riding as to make him responsible for the driver's fault. It was held by us that the passenger in that street-car was not responsible for the negligence of the driver; that the latter was in no just sense the agent of the former, and had no control of, or direction over, the management of the vehicle in which he was riding, so as to identify driver and passenger.

The opposite doctrine, though supported by high authority, has not been received even in England with approbation.

We cite a few of the cases and text-books touching this vexed question, but, since the subject was fully considered in *Transfer Company v. Kelly*, *supra*, we need not further consider it. See *Armstrong v. Lancashire Ry. Co.*, L. R., 10 Exch. 47; *Waite v. N. E. Rd., El., Bl. & L.* 719 (a case of a child too young to take care of itself); *Lockhart v. Litchenthaler*, 46 Penn. St. 151; *Thompson on Carriers of Passengers*, c. 7, where all the cases *pro* and *con* are cited, notes, p. 284; *Bennett v. N. J. Rd.* 36 N. J. L. 221; 1 *Smith's Lead. Cases* (8th Am. ed. p. 505, *315; *Danville Turnpike Co. v. Stewart*, 2 Mct. (Ky.) 119; *Chapman v. N. H. Rd. Co.*, 19 N.Y. 341; *Colegrove v. N. Y. & N. H. Rd. Co.*, 20 Id. 492; *Louisville, etc., Rd. v. Case's Adm'r*, 9 Bush (Ky.) 728; *Wharton on Neg.* § 395; *Webster v. H. R. Rd. Co.*, 38 N. Y. 260.

The foregoing cases mostly relate to passengers by public carriers, and when the passenger is injured by the negligence of another public carrier, or of a third person.

It only remains to determine if a like rule applies when the plaintiff was passenger in a private conveyance. We think it does. The plaintiff in the case at bar was in no just sense the master, nor was her father her agent or under her control or direction. In *Puterbaugh v. Reasor*, 9 Ohio St. 484, the want of ordinary care of plaintiff's agent prevented his recovery, when the agent's negligence directly contributed to the injury, though the defendant was also guilty. But it is well settled that passengers in a public conveyance are not so liable for the negligence of the employees of the carrier, because they are not the agents of the passenger. The same reasons apply with equal force to a private carrier. Plaintiff's relations to her father being that of a passenger in his wagon, going to their common home, did not, in law, make him her servant or agent, and as such responsible for his misconduct. If he had brought an action for the loss of services of his daughter, caused by this injury, his contributory negligence would defeat a recovery, nor could he recover for his own injuries for the same reason. This is because he was guilty with the defendant of causing the collision. Neither does the fact that she was the daughter defeat her rights. If her father's misconduct or negligence contributed to the injury, why should that fact exonerate a joint wrong-doer? *Robinson v. N. Y. Cent. Rd.*, 66 N. Y. 11, was the case of a female who had accepted an invitation to ride with a gentleman who was the owner and driver of a buggy in which they were riding, when she was injured through the joint negligence of her driver and a train of cars. CHURCH, C. J., says: "I am unable to find any legal principle upon which to impute to plaintiff the negligence of the driver. * * * The acceptance of an invitation to ride creates no more responsibility for the acts of the driver, than the riding in a stage coach, or even a train of cars, providing there was no negligence on account of the character or condition of the driver or the safety of the vehicle, or

otherwise. It is no excuse for the negligence of defendant that another person's negligence contributed to the injury for whose acts the plaintiff was not responsible."

We think this reasoning unanswerable, notwithstanding the adverse criticism and contrary holding in *Prideaux v. City of Mineral Point*, 43 Wis. 513. This doctrine of "imputed negligence" and the reasons for its application were considered in *B. & I. Rd. Co. v. Snyder*, 18 Ohio St. 399. That was the case of a child six years old, and the negligence of the parent or custodian of the child did not prevent its recovery against one also guilty. The court say, the rule that contributory negligence bars a recovery is founded on, 1. The mutuality of the wrong; 2. The impolicy of allowing a party to recover for his own wrong; and 3. The policy of making personal interests of parties depend on their own prudence and care. It was said all these were wanting in the case then before the court. With equal truth it can be said that all these reasons are wanting in the present case, where it is conceded the plaintiff was in no fault. Whether in this case the father would have been jointly liable with defendant, we need not now determine. By the well-settled rule of law he would be, unless his relation to her modifies this rule, for his culpable negligence, she being *sui juris* and not guilty of want of proper care for her own safety: *Boyd v. Watt*, 27 Ohio St. 259; *Whart. on Neg.*, § 144; *Shear & Redf. on Neg.* § 58.

If it be conceded that he would not be so liable, either by reason of his parental relation or that it was a gratuitous service, that would not excuse the negligence of the defendant, nor bar the plaintiff, who was free from fault, from recovering from the other wrongdoer, whose negligence was a proximate cause of injury.

Judgment affirmed.

Note on the foregoing.

As is well known to the profession, the English case of *Thorogood v. Bryan*, 8 C. B. 114, 122, holds a different

doctrine from that of the principal case. In that case it is held that a passenger upon an omnibus of a common carrier who receives injuries caused from the concurring negligence of such carrier and a third person, is not entitled to recover damages from the third person, for the reason that the passenger is so identified with the carrier and his servants, that the negligence of the carrier is to be imputed to the passenger, *i. e.*, that such passenger contributed to his own injury. This doctrine has been expressly repudiated in a number of well-considered cases in this country: nor has it been received with approbation in England: *Waite v. North Eastern Ry. El., Bl. & El.* 728; *Tuff v. Warman*, 2 C. B. (N. S.) 750.

In *The Milan*, 1 Lush. 388, 403, the judge of the High Court of Admiralty, in speaking of *Thorogood v. Bryan*, said: "With respect to the judges who decided that case, I do not consider that it is necessary for me to dissect the judgment, but I decline to be bound by it, because it is a single case: because I know, upon inquiry, that it has been doubted by high authority; because it appears to me not reconcilable with other principles laid down at common law: lastly, because it is directly against *Hay v. Le Neve*, 2 Shaw's S. C. App. 405, and the ordinary practice of the Court of Admiralty."

Greenland v. Chaplin, 5 Exch. 242, and *Rigby v. Hewitt*, *Id.* 240, cases decided after *Thorogood v. Bryan*, do not follow the doctrine of the latter case.

In a note to *Ashby v. White*, 1 Smith's Lead. Cas. (6th Am. Ed.) 450, we find the following: "If two drunken stage-coachmen were to drive their respective carriages against each other, and injure the passengers, each would have to bear the injury to his own carriage, no doubt; but it seems highly unreasonable that each set of passengers should, by a fiction, be identified with the coachman who drove them so as to be restricted for remedy to actions against their own driver or his employer. This, nevertheless, appears to be the result of the decision in *Thorogood*

v. Bryan, 8 C. B. 115, but it may be questioned whether the reasoning in that case is consistent with those of *Rigby v. Herwitz*, 5 Exch. 240, and *Greenland v. Chaplin*, Id. 243, or with the series of decisions from *Quarman v. Burnett*, 6 M. & W. 499, to *Reedie v. London, &c., Ry.*, 4 Exch. 244, and *Dalyell v. Tyrer*, 28 L. J. (Q. B.) 52. Why in this particular case both wrongdoers should not be considered liable to a person, free from all blame, not answerable for the acts of either of them, and whom they have both injured, is a question which seems to deserve more consideration than is received in *Thorogood v. Bryan*."

Child v. Hearn, L. R., 9 Exch. 176, 182, and *Armstrong v. Lancashire, &c., Ry.*, L. R., 10 Id. 47; s. c. 44 L. J. (Exch.) 89, seem to approve of the doctrine of "anomalous identification" of *Thorogood v. Bryan*.

The doctrine of *Thorogood v. Bryan*, rests on the ground that the plaintiff having voluntarily trusted himself on the omnibus, had so identified himself with its management, that the driver's negligence deprived him of any right of action against the owner of the other vehicle.

The general principle applicable is that the contributory negligence of a third person does not constitute a defence, unless such negligence is imputable to the plaintiff: *Burrows v. March Gas & Coke Co.*, L. R., 5 Exch. 67; *Sheridan v. Brooklyn, &c., Rd.*, 36 N. Y. 39; *Cayzer v. Taylor*, 10 Gray 274; *Mott v. H. R. Rd.*, 8 Bosw. 345. Such contributory negligence is not to be imputed to the plaintiff, unless such third person is under his direction or control, as agent or servant. This direction rests on the familiar maxim, "*qui facit per alium, facit per se*," and is just. When this relation of principal and agent, or master and servant is complete, the contributory negligence of such agent or servant is always to be imputed to his principal or master. *Puterbaugh v. Reasor*, 9 Ohio St. 484, well illustrates this rule. There the injury resulted from the concurring negligence of two servants, one being the servant of the plaintiff. The plaintiff was not permitted to recover for the reason that his servant,

over whom he had control, contributed to the injury, such negligence being fairly imputed to him; see *Otis v. Thom*, 23 Ala. 469.

The doctrine of *Thorogood v. Bryan*, *supra*, seems to have been adopted in Pennsylvania in *Lockhart v. Lichtenthaler*, 46 Penn. St. 151, 165. There the injury resulted from the mutual negligence of the servants of both vehicles, the one in which plaintiff was riding, being a public conveyance, he having no control over the driver of it, yet the court held that his driver alone was responsible for the injury. But while adopting the doctrine, the court refused to follow the reason of the English case. THOMPSON, J., said: (p. 164) "I would say the reason for it, that it better accords with the policy of the law to hold the carrier alone responsible in such circumstances as an incentive to care and diligence. As the law fixes the responsibility upon a different principle in case of the carrier, as already noticed from that of a party who does not stand in that relation to the party injured, the the very philosophy of the requirement of greater care is that he shall be answerable for omitting any duty which the law has defined as his rule and guide, and will not permit him to escape by imputing negligence of a less culpable character to others, but sufficient to render them liable for the consequences of his own. It would be altogether more just to hold liable him who has engaged to observe the highest degree of diligence and care and has been compensated for so doing, rather than upon him upon whom no such obligation rests, and who not being compensated for the observance of such a degree of care, acts only on the duty to observe ordinary care, and may not be aware even of the presence of a party, who might be injured. This rule, it cannot be doubted, will be more likely to increase diligence than the opposite, which would enable a negligent and faithless party to escape the consequences of his want of care by swearing it on another, which he would assuredly do if the temptation and opportunity offered. As this view accords best with the policy of the law, it is proof of the existence of the rule itself." The court after reviewing fully the

decisions concludes that the clear preponderance is in favor of the doctrine that mutual negligence in case of an injury to a third person is a defence.

In Pennsylvania this doctrine was again affirmed in *Phila. & Reading Rd. v. Boyer*, 97 Penn. St. 91, 100, where death was caused by collision of a street car that deceased was on, and a locomotive of defendant. The court stated that the success of the action depended upon two assumptions: (1) That death resulted directly from the carelessness of the defendant's servants: (2) That the person in charge of the street-car was chargeable with no negligence. "It is on this hypothesis that suit can be maintained, for the rule is, that where a passenger on a carrier vehicle is injured by a collision resulting from the mutual negligence of those in charge of it, and another party, the carrier alone must answer for the injury: *Lockhart v. Lichtenthaler*, *supra*."

But the better rule is that where the negligence is joint, he may recover from either, or both. This rule is supported by the weight of authority: *Colegrove v. Rd.*, 20 N. Y. 492; *s. c.* 6 Duer 382; *Webster v. Hudson*, 38 N. Y. 260; *Davey v. Chamberlain*, 4 Esq. 229; *Wharton on Neg.* § 395; *Barrett v. Rd.*, 45 N. Y. 628. *Danville, &c., Tp. v. Stewart*, 2 Met. (Ky.) 119, lays down the rule that where an injury is occasioned by the negligence of two persons, the fault of one is no excuse for that of the other. Both in such case are liable to the party injured; following the principle of this case is *Louisville, &c., Rd. v. Case*, 9 Bush (Ky.) 728, 735.

In *Tomkins v. Clay Street Hill Railroad Co.*, 4 West Coast Rep. 537; *s. c.* 4 Pac. Rep. 1165, plaintiff was injured by being thrown from a street-car which collided with another. The servants of both cars were responsible for the accident. It was held that plaintiff could recover from either or both companies, and where both are sued, the plaintiff may ordinarily dismiss as to either, and, if it turns out at the trial that one was not guilty of negligence, he may, on sufficient evidence, take a verdict against the other; but satisfaction received from one company, is a bar to an action against the

other. The court said: "Every party contributing to the injury of plaintiff was liable to the full extent of damages by her sustained. Her injury gave her but a single cause of action. * * * Damages resulting from the same wrongful transaction are ordinarily inseparable; she could not recover part from one and part from the other defendant;" *Urton v. Price*, 7 Pac. C. L. J. 82; 57 Cal. 272; *Cooley on Torts* 139.

Chapman v. New Haven Rd., 19 N. Y., 341, is against *Thorogood v. Bryan*, also. The plaintiff was a passenger on a New York and Harlem train. The injury occurred by collision of his train with another train, through concurring negligence of the managers of the respective trains. It was held that the passenger was not so identified with the proprietors, or their servants, of the train conveying him as to be responsible for negligence on their part, and therefore he could recover from defendant. Referring to *Thorogood v. Bryan*, JOHNSON, C. J., said (p. 344), "But I do not see the justice of the doctrine in connection with the case before us. It is entirely plain that the plaintiff has no control, management, even no advisory power over the train on which he was riding. Even as to selection he has the choice of going by that railroad or none. To attribute to him therefore the negligence of the agents of the company and thus bar him of a right of recovery is not applying any existing exception to the general rule of law, but is framing a new exception which does not in fact rest upon the reason of the original exception, and is based on fiction and inconsistent with justice."

We find a still stronger denunciation of the doctrine of *Thorogood v. Bryan* in *Bennett v. N. J. Rd., & Tr. Co.* 36 N. J. L. 225. The plaintiff while riding on a street car was injured by carelessness of engineer of defendant and contributory negligence of driver of street car. The plaintiff was held entitled to recover. Beasley, C. J., in referring to *Thorogood v. Bryan*, said, "This case stands, I think, in point of principle, alone in the line of English

decisions, and the grounds upon which it rests seem to me inconsistent with familiar rules. The reason given for the judgment is, that a passenger in the omnibus must be considered as identified with the driver of the omnibus in which he is voluntarily a passenger, and that the negligence of the driver is the negligence of the passenger. But I have entirely failed to perceive how it is that the passenger in a public conveyance becomes identified, in any legal sense, with the driver of such conveyance. Such identification could result only in one way; that is, by considering such a driver the servant of the plaintiff. I can see no ground upon which such relationship is to be founded. In a practical point of view it certainly does not exist. The passenger has no control over the driver or agent in charge of the vehicle. And it is this right to control the conduct of the agent, which is the foundation of the doctrine that the master is to be affected by the acts of his servants. To hold that the conductor of a street car or a railroad train is the agent of the numerous passengers who may chance to be in it, would be a pure fiction. In reality there is no such agency, and if we impute it, and correctly apply legal principles, the passenger, on the occurrence of an accident from the carelessness of the person in charge of the vehicle in which he is being conveyed, would be without any remedy. It is obvious in a suit against the proprietor of the car in which he was a passenger, there could be no recovery if the driver or conductor of such car, is to be regarded as the servant of such passenger. And so, on the same ground, each passenger would be liable to every person injured by the carelessness of such driver or conductor; because if the negligence of such agent is to be attributed to the passenger for one purpose, it would be entirely arbitrary to say that he is not to be affected by it for other purposes. . . . The doctrine of the English case appears to convert the driver of the omnibus into the servant of the passenger for the single purpose of preventing the passenger from bringing suit against a third party, whose negligence had co-operated

with that of the driver in the production of the injury. I am compelled to dissent from such a position. Under the circumstances in question, the passenger is a perfectly innocent party, having no control over either of the wrongdoers; and I can see no reason why according to the usual rule an action will not lie in his behalf against either or both of the employers of such wrongdoers."

Louisville, &c., Rd. v. Case's Adm'r, 9 Bush. (Ky.) 728, holds a contrary doctrine from *Thorogood v. Bryan*. Here the passenger was in a street-car and lost his life by collision of his car with a railroad train of defendant, occasioned by concurring negligence of the driver of street-car and the servants of defendant. There was a recovery, as the driver was held not to be a servant of the passenger, nor subject to his government or control. In this case it was said (p. 735), "Notwithstanding the driver of the street-car may have recklessly driven across the track of the railroad company in dangerous proximity to the moving train, still the servants of the company, so soon as it became apparent that he intended to do so, were under obligations to the passengers on the street-car to use all proper efforts to arrest the progress of the train, and prevent, if possible, the collision; but as it is much more difficult to control the movements of a heavy train of cars than to check a single street-car drawn by mules or horses, the employees of the railroad company could not anticipate that the driver of the street-car would attempt to cross the street in the face of the advancing train, and consequently could not be expected to take steps to arrest an unexpected danger until it became manifest that the driver intended to act contrary to the course usually adopted by persons of reasonable prudence under like circumstances. But the negligence of the driver will not excuse negligence on the part of the railroad employees. If the life of Case was destroyed by the concurrent negligence of two or more persons, none of whom were acting as his agent or servant, nor subject to his government or control, all the employers of the guilty agents may be held responsible for the injury, and one cannot plead the

negligence of the servants of the other as matter of defence in an action against himself. This doctrine was announced by this court in *Stewart's Case*, 2 Met. (Ky. 119, and it is in harmony with the reason of the law, and we are not inclined to depart from it, although a different rule appears to have been followed in one English and a few American cases."

In *Cuddy v. Horn*, 46 Mich. 596, (s. c. 21 Am. L. Reg. N. S. 302, and note), the injury was caused by collision of two steamers, through mutual negligence of managers of each. One of the vessels had been chartered, but the charterer did not control the movements of the boat. The action was against the owners of both vessels, and was sustained, citing *Colegrove v. Rd.*, 20 N. Y. 492; *Cooper v. E. T. Co.*, 79 Id. 116; *Hulman v. Newington*, 57 Cal. 56.

PRIVATE CONVEYANCES.—Many cases have made a distinction between public and private conveyances, but others have refused to recognize any difference in the principle of the doctrine.

The grounds for this distinction are well stated by Ryan, C. J., in *Prideaux v. Mineral Point*, 43 Wis. 513, 526. In that case plaintiff was riding in a private conveyance at the invitation of the driver, and it was held that the driver was the agent of the plaintiff whose negligence was imputable to him. Ryan, C. J., said (p. 528), "One in a private conveyance voluntarily trusts his personal safety in the conveyance to the person in control of it. Voluntary entrance into a private conveyance adopts the conveyance for the time being as one's own, and assumes the risk of the skill of the person guiding it. *Pro hac vice*, the master of a private yacht or the driver of a private carriage is accepted as agent by every person voluntarily committing himself to it. When *pater familias* drives his wife and child in his own vehicle he is surely their agent in driving them, to charge them with negligence. It is difficult to perceive on what principle he is less the agent of one who accepts his or their invitation to ride with them. There is a personal trust in such cases, which implies an agency. So, several persons voluntarily

associating themselves to travel together in one conveyance, not only put a personal trust in the skill of that one of them whom they trust with the direction and control of the conveyance, but appear to put a personal trust each in the direction of each against negligence affecting the common safety. One enters a private conveyance in some sort of free choice, voluntarily trusting to its sufficiency and safety. It appears absurd that one voluntarily choosing to ride in a private conveyance trusts to the sufficiency of the highway, to the care and skill exercised in all other vehicles upon it, to the care and skill governing trains at railroad crossings, to the care and skill of everything except that which is most immediately important to himself, and trusts nothing to the sufficiency of the very vehicle in which he voluntarily travels, nothing to the care and skill of the person in charge of it. His voluntary entrance is an act of faith in the driver; by implication of law he accepts the driver as his agent to drive him. In the absence of express adjudication, the general rules of implied agency appears to sanction this view." See *Houffe v. Fulton*, 29 Wis. 296. *Otis v. Janesville*, 47 Id. 422, follows *Prideaux v. Mineral Point*, *supra*, and holds that the contributory negligence of the driver of a private conveyance in which a person is voluntarily riding at the time of receiving an injury from a defective highway, is imputable to the person so injured, to prevent a recovery.

This distinction has also been taken in Michigan. In *Lake Shore, etc., Rd. v. Miller*, 25 Mich. 274, 287, a female servant was riding with her employer in his wagon, which was wrecked by a railroad train of defendant. The driver of the wagon appeared to have been guilty of negligence directly contributing to the injury against which the plaintiff warned him. This negligence was held to be imputed to the plaintiff, so as to preclude a recovery.

Iowa has also adopted this rule. In *Payne v. C., R. I. & P. Rd.*, 39 Iowa, 523, the action was for injuries received at a railroad crossing of defendant by collision of a wagon with defendants' train. The wagon was driven by a third person

and plaintiff was a voluntary passenger therein. It was held that the plaintiff was bound to rely upon the diligence of the driver for a recovery.

This distinction was adopted in one New York case—*Brown v. N. Y. Cent. Rd.*, 31 Barb. 385—but denied in others. In *Robinson v. N. Y. & H. R. Rd.*, 66 N. Y. 11, a female accepted an invitation to ride in a buggy with a person who was entirely competent to manage the horses. While crossing the defendant's railroad track the buggy collided with defendant's train. It was held that if she was free from negligence herself, she was entitled to recover, although the driver might be guilty of negligence which contributed to the injury. This case is criticised by RYAN, C. J., in *Prideaux v. Mineral Point*, *supra*.

The New York case, *Robinson v. Rd. supra*, is approved in *Dyer v. Erie Ry.* 71 N. Y. 228. In that case plaintiff was injured while crossing defendants' railroad track in a public thoroughfare, while riding by permission and invitation of a third person, the owner of the horses and wagon driven. It was held that as no relationship of principal and agent arose between the plaintiff and the driver of the vehicle, the former was not responsible for the negligence of the latter, where he himself is not chargeable with negligence, and where there is no claim that the driver was not competent to control and manage the train. This case affirms that of *Robinson v. Rd.*, *supra*, and put this principle at rest in New York.

In *Metcalf v. Baker*, 11 Ab. Pr. Rep. (N. S.) 431; s. c. 2 Jones & Sp. 10, plaintiff was riding gratuitously in A.'s carriage, who was driving at the time of the accident, which was caused by collision of A.'s carriage with defendant's wagon, which was driven by defendant's servant. Both drivers contributed to the injury. The plaintiff was held entitled to recover, citing and approving *Colegrove v. N. Y. & H. R. Rd.*, 6 Duer, 382; s. c. 20 N. Y. 492.

In *Knapp v. Dagg*, 18 How. Prac. 165, plaintiff was riding as a passenger in her brother's wagon, when they met and

collided with the defendant's wagon, she being thrown out and injured, the accident being occasioned by mutual negligence of both drivers, without any blame on part of plaintiff unless in riding with a careless driver. She was held not to be chargeable with the negligence of her driver. The court said (p. 165): "The plaintiff is not chargeable with the negligence of the driver of the team after which she rode. She could have sued him for the injury she has sustained. The defendant is guilty of injuring her as well as he is. They have severally wronged her. She might sue either." It was said in *Brown v. Rd.*, *supra*, that this case was not good law, but *Robinson v. Rd.*, *supra*, and *Dryer v. Erie Ry.*, *supra*, settle the rule this way in N. Y.

The principal case fully sustains the New York rule.

EUGENE MCQUILLEN.

[Since the receipt of the above note, a decision of the Court of Errors and Appeals of New Jersey has been published, in which that court also declines to adopt the rule laid down in *Thorogood v. Bryan*. See *N. Y., L. E. & West. Rd. v. Steinbrenner*, 18 *Vroom*, 161 *ante*, p. 684.—ED.]

—(*American Law Register*.)

EDITORIAL NOTES.

With this number the MANITOBA LAW JOURNAL ceases publication. Our bar is as yet far too small to support a journal. Coupled with the Reports it might live, but, the Law Society having now undertaken that work, it must die. We trust that before many years it may revive under better auspices and abler direction.



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